APPENDIX

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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1971
CERTIORARI GRANTED OCTOBER 26, 1971

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Entry

(District Court Proceedings)

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Feb. 17, 1969—Summons Filed ..... (4)

Feb. 28, 1969—Order Denying Motion for Temporary Restraining Order Filed ..... (11)

Mar. 7, 1969—Answer Filed ..... (12)

Apr. 30, 1969—Pretrial Conference Memorandum Filed ..... (13)

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Entry

May 29, 1969—Affidavits in Opposition to Plaintiff's Motion for partial Summary Judgment Filed ..... (28 (29) (30) (31)

Mar. 12, 1970—Memorandum and Order of District Court Denying Defendant's Motion ..... (33)

Apr. 10, 1970—Filed Notice of Appeal by Defendants Board of Regents of State Colleges and Roger E. Guiles ..... (34)

Apr. 20, 1970—Defendants' Notice and Motion for Stay of District Court's Order Filed ..... (37)

May 15, 1970—Order Granting Stay Filed ..... (38)

(Seventh Circuit Court Proceedings)

July 1, 1971—Decision of Seventh Circuit Court entered affirming District Court's order.

July 8, 1971—Notice and Motion for Stay of Seventh Circuit Court mandate mailed.

July 14, 1971—Stay granted by Seventh Circuit Court of Appeals.

Entry

(Supreme Court of the United States Proceedings)

August 3, 1971—Petition for writ of certiorari by defendants docketed.

October 26, 1971—Certiorari granted by United States Supreme Court to the United States Court of Appeals for The Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN

DAVID F. ROTH, for himself
and for all others similarly
situated,

Plaintiff,

v.

COMPLAINT
File NO. 69-C-24

THE BOARD OF REGENTS OF STATE
COLLEGES and ROGER E. GUILES,

Defendants.

(Filed Feb. 14, 1969)

NOW COMES the Plaintiff, through his attorneys, Charles D. Hoornstra and Steven Steinglass, and as and for a cause of action, on behalf of himself and on behalf of all who are similarly situated, and against the Defendants, alleges the following:

1. That the Plaintiff, David F. Roth, is a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, State of Wisconsin.

2. That the Defendant, Board of Regents of State Colleges, is a body corporate organized under Chapter 37, Wis. Stats., and pursuant thereto regulates, governs and manages the branch of higher education in the State of Wisconsin known as the State University System which includes Wisconsin State University-Oshkosh, and the offices of the Defendant Board are located in Madison, Wisconsin.

3. That the Defendant, Roger E. Guiles, is President of Wisconsin State University-Oshkosh, which University is located in Oshkosh, Wisconsin, and that the said Roger E. Guiles, by and through authority delegated to him by the Defendant, Board of Regents, directs, governs and manages the said University.

4. That the Plaintiff was retained by the Defendants as an assistant professor to teach in the departments of political science and international studies at Wisconsin State University-Oshkosh for the school year 1968-1969, and the Plaintiff performed and continues to perform those duties pursuant to such retention.

5. That the campus at Wisconsin State University-Oshkosh has been involved in disturbances and personal clashes concerning the University administration and these Defendents, and the Plaintiff has been vocal in his expressions of opinion with respect to such disturbances and clashes, and such expressions have been critical of the University administrators and these Defendants.

6. That the Plaintiff was advised on January 30, 1969 by the Defendant, Roger E. Guiles, purporting to act under due authority, that the Plaintiff would not be retained as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970.

7. That the Defendants, or their agents, refused to give any reasons for their decision to not retain the Plaintiff as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

8. That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expressions of opinion.

9. That the decision of the Defendants is a denial, violation, restraint, and deprivation of the Plaintiff's rights to free speech under the United States Constitution.

10. That the decision of the Defendants was not made under ascertainable and definite standards governing the Defendants in making this decision.

11. That the Defendants, through their agents, caused the following by-law to be enacted and made applicable to the Plaintiff:

> During a Department Member's first or second year of service, a recommendation for or against his reappointment shall be made by December 15th and the member notified immediately. Such a vote is not to be made without secret ballot participation by the tenured departmental members as well as the Chaiman. . . .
>
> All votes required by this section of the bylaws will be conducted as follows. The Tenured Department Members will meet, in the absence of those whose cases are being considered at the call of the Chairman, who will chair the meeting. Decisions will be made by a majority vote of those eligible to vote, i.e. the tenured department Members plus the Chairman if he is not on tenure. Department Members on leave, or absent for other reasons, may vote by absentee ballot.
>
> *Any person not reappointed or granted tenure will be* given an explanation in writing of the reasons for the decision not to retain him.

12. That pursuant to said by-law the Tenured Department Members unanimously voted on December 15, 1968 to recommend that the Plaintiff be retained on the Wisconsin State University-Oshkosh faculty for the year 1969-1970.

13. That notwithstanding such unanimous vote, the Defendants, or their agents, decided, and so advised the Plaintiff, that the Plaintiff would not be so retained.

14. That such decision of the Defendants has caused and, unless such decision is restrained from enforcement, will cause the Plaintiff damages to his professional reputation and standing for which there is no adequate remedy at law.

15. That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Wisconsin State University-Oshkosh faculty members similarly situated because the Plaintiff and those so situated have exercised their right of free speech in a way critical of the Defendants.

16. That the conduct of the Defendants as described in paragraphs 6, 7, 8, 9, 10, 13 and 15 of this Complaint has made the Plaintiff and those Wisconsin State University-Oshkosh faculty members similarly situated reluctant and fearful to express their opinions.

17. That the Plaintiff brings this action on behalf of himself, on behalf of many of Wisconsin State University-Oshkosh faculty members, too numerous to join herein, who have been intimidated and harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Wisconsin State University-Oshkosh faculty members, too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein.

WHEREFORE, the Plaintiff demands the following relief:

1. A judgment that the decision of the Defendants that the Plaintiff not be retained as a member of the Wisconsin State University-Oshkosh faculty for the school year of 1969-1970 is in violation of the Plaintiff's rights, and in violation of the rights of those similarly situated, under the First and Fourteenth Amendments to the United States Constitution.

2. A judgment that the failure of the Defendants to provide the Plaintiff with an impartial hearing as to the merits of such decision was arbitrary, capricious, and contrary to the Plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

3. A judgment that the refusal of the Defendants to give reasons for their decision was arbitrary, capricious and in violation of the rights of the Plaintiff, and those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

4. A judgment that the failure of the Defendants to make such decision under ascertainable and definite standards was arbitrary, capricious and in violation of the rights of the Plaintiff and those similarly situated under the First, Fifth and Fourteenth Amendments, to the United States Constitution.

5. An order of the Court directing the Defendants to retain the Plaintiff in his position as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970 at the same level of responsibility and function as per the retention for the school year 1968-1969, and

6. For such other and further relief as may be equitable.

Dated this 14th day of February, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

ANSWER

(Filed Mar. 7, 1969)

The defendants, The Board of Regents of State Universities and Roger E. Guiles, by Robert W. Warren, Attorney General, and Charles A. Bleck, Assistant Attorney General of the State of Wisconsin, their attorneys, and E. L. Wingert of counsel, answer the complaint herein as follows:

1. Admit the allegations of paragraph 1.

2. Admit the allegations of paragraph 2, but allege that the name of the board of regents is The Board of Regents of State Universities.

3. Admit the allegations of paragraph 3.

4. Answering paragraph 4, admit that Plaintiff was appointed to the faculty as alleged, but deny that Plaintiff performed fully or faithfully his duties under such appointment.

5-6. Admit the allegations of paragraphs 5 and 6.

7. Answering paragraph 7, deny that the Defendants refused to give reasons for the decision not to retain Plaintiff, and admit that Defendants did not offer Plaintiff a hearing on the merits of the decision. Defendants deny that the decision was that of The Board of Regents of State Universities; and are without knowledge of information sufficient to form a belief as to whether any of their agents or subordinates refuse to give reasons for the decision.

8. Answering paragraph 8, Defendants deny that the reason for the decision not to employ Plaintiff for another year was to retaliate against Plaintiff for his expressions of opinion, and allege that the sole reason for the decision was that Plaintiff was guilty of substantial neglect of duty, violation of duty, violation of University rules, and insubordination in the course of his employment, to the detriment of the students in his classes and of the University which he was employed to serve.

9. Answering paragraph 9, Defendants deny that the decision not to employ Plaintiff for another year denies, violates, restrains or deprives Plaintiff of any right under the Constitution or laws of the United States, or any other right.

10. Answering paragraph 10, allege that by virtue of the laws of the State of Wisconsin and particularly sec. 37.11 (3) of the Statutes of 1967, Defendants may at their pleasure and without conforming to any particular standard, decline to employ for another year a teacher who has not attained tenure pursuant to sec. 37.31 (1) Wis. Stats. by virtue of four years of continuous service in the State University System as a teacher; and that Plaintiff had never been employed in the Wisconsin State University System prior to the academic year 1968-1969, and therefore had less than one year of such service in the System. Further allege that in making the decision not to employ Plaintiff for another year, President Guiles was guided by the standard of what is best for the University and its educational objectives and for its students.

11. Answering paragraph 11, deny that the provision quoted therein is a by-law of The Board of Regents or of the University at Oshkosh, deny that Defendants caused the provision to be enacted or made applicable to Plaintiff, and allege that said quoted provision is merely a statement of intra-departmental policy adopted by the Department of Political Science at Oshkosh, which is not binding upon the President, the University administration generally, or The Board of Regents.

12. Admit the allegations of paragraph 12, but allege that on January 27, 1969 the Tenure Committee of the Department of Political Science met, reconsidered the recommendation alleged in the complaint, voted to recommend that Plaintiff not be retained, and did so recommend.

13. Admit the allegations of paragraph 13 with respect to Defendant Guiles, but deny that The Board of Regents took the alleged action.

14. Answering paragraph 14, Defendants are without knowledge or information sufficient to form a belief as to whether the decision not to employ Plaintiff for another year has caused or will cause him damage, but allege that any such damage is the result of Plaintiff's own misconduct, and that Defendants are not liable for any such damage.

15. Answering paragraph 15, deny that Defendants or their agents have intimidated or harassed the Plaintiff or other faculty members.

16. Answering paragraph 16, Defendants are without knowledge or information sufficient to form a belief as to whether any conduct on their part has made Plaintiff or any other faculty member reluctant or fearful to express his opinions; but allege that they have not engaged in any conduct which has given any faculty member reasonable cause for any such reluctance or fear.

17. Answering paragraph 17, Defendants deny that they or their agents have intimidated or harassed any members of the faculty at Oshkosh or elsewhere or that their conduct has given Plaintiff or any such faculty member any reason to become fearful or reluctant to express his opinions. Defendants are without knowledge or information sufficient to form a belief as to whether any faculty members at Oshkosh have become fearful or reluctant to express their opinions.

18. Further answering, Defendants deny that this is a proper class action, and deny that the questions of law and fact in this case are common to anyone other than Plaintiff, and allege that the decision not to employ Plaintiff for another year was based solely on facts peculiar to Plaintiff.

19. Further answering, Defendants allege that the complaint fails to state grounds upon which the Court's jurisdiction depends.

20. Further answering, Defendants allege that the complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Defendants pray that Plaintiff's complaint be dismissed on the merits.

Dated: March 6, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

PRETRIAL CONFERENCE MEMORANDUM

(Entered Apr. 30, 1969)

A pretrial conference was held by telephone April 29, 1969. The plaintiff appeared by Charles D. Hoornstra and Steven Steinglass, participating from Madison; the defendants appeared by Assistant Attorney General Charles Bleck and E. L. Wingert, participating from Madison; the court participated from La Crosse.

On or before May 16, 1969, either party may serve and file a motion for summary judgment or a motion for partial summary judgment, together with a supporting brief; within 10

days from service of said motion and supporting brief; the opposing party may serve and file affidavits and a brief in opposition; within seven days from service of said opposing affidavits and brief, the movant may serve and file a reply brief. Said motion or motions will be set for hearing in early June (not June 3 or 4), 1969.

Entered this 30th day of April, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ACTION

(Filed May 16, 1969)

The defendants move the Court, on the affidavits of Roger E. Guiles and Eugene R. McPhee served and filed herewith and on the deposition of plaintiff and the pleadings and other papers on file herein, for summary judgment dismissing the action on the merits, because the complaint fails to state a claim against defendants upon which relief can be granted, and because facts which cannot be disputed show that no constitutional, federal or other right of the plaintiff has been violated by the action complained of; and for the further reason that plaintiff has failed to exhaust his administrative remedies.

Dated May 16, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT IN SUPPORT OF MOTION

(Filed May 16, 1969)

* * *

Eugene R. McPhee, being first duly sworn, on oath says:

1. I am the Executive Secretary of the Wisconsin State Universities System and the Secretary of the Board of Regents of State Universities, and in those capacities have custody of the official files of the Board of Regents and of the Wisconsin State Universities System; and I make this affidavit in support of the motion of the defendants for summary judgment in the above entitled action.

2. Attached hereto as Exhibit A is a true copy of "Faculty Appointment to Wisconsin State University" constituting the appointment of the plaintiff, David F. Roth, to the faculty of Wisconsin State University-Oshkosh, for the academic year beginning September 1, 1968 and ending June 30, 1969; the original of which is in the files in my custody.

3. The appointment specified in Exhibit A is the only appointment which David F. Roth has or has ever had to the faculty of any university in the Wisconsin State Universities System and the only teaching employment he has ever had with any such university. There exists no other contract or agreement between David F. Roth and any Wisconsin State University.

4. Neither the Board of Regents of State Universities nor affiant has taken any action with respect to the appointment or non-appointment of David F. Roth for another year at Wisconsin State University--Oshkosh, and neither has directed, advised or participated in the decision of President Roger E. Guiles not to offer re-appointment to Dr. Roth.

5. No appeal or request has been received by the Board of Regents of State Universities or by affiant from or on behalf of plaintiff David F. Roth for a review of the decision of President Guiles not to re-appoint him.

Dated May 15, 1969.

(Jurat and Execution Omitted)

Exhibit A

State of Wisconsin Board of Regents
of State Universities

FACULTY APPOINTMENT
TO
WISCONSIN STATE UNIVERSITY

Name: First, Middle, Last David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number - 0262

Location: Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968

Accepted: (Date) June 1, 1968

David F. Roth
(Signature, Faculty Member)

Recommended: (Date:) 6/11/68

R. E. Guiles
(Signature, University President)

Approved: (Date:) 6/12/68

Eugene R. McPhee
(Signature, Secretary of the Board)

Appointment Basis:

- [x] Academic Year
- [ ] Full Year
- [ ] New Position
- [x] Replacement L. Larry Leonard (Name)
- [ ] Other _____

Exhibit A (continued)

Rate of Pay: $9,800 Date of Birth: Mar. 22, 1939

Years of Teaching Experience: None.
College: Secondary: Elementary:

Educational Preparation:

Degree:	Date:	Institution:
B.A.	1960	Claremont Men's College
M.A.	1965	San Francisco State College
(expected) Ph.D.	1968	Claremont Graduate School

Notice of Employment - Unclassified (Form No. SC-P-3)

BOARD OF REGENTS OF STATE UNIVERSITIES
142 E. Gilman Street, P.O. Box 912
Madison, Wisconsin 53701
WISCONSIN STATE UNIVERSITY- Oshkosh

Name: (First, Middle, Last) David F. Roth
Maiden Name:
Date of Birth: (Month, Day, Year) March 22, 1939
Social Security Number: 569 50 5719
Accounting Code: 101 03 3171 40000
Rank and/or Title: Assistant Professor
Teaching Assignment: Political Science
Salary: 9,800 Per Month: 980.00
Tax Exemp. 2 Teacher Ret.: T Soc. Sec. T
Marital Status: Single ☐ Married ☒
Other Deduction: Name Effective Date:
Will advise us later.
Amount of one ded. No. of Ded.

Regulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.

Date began university service: (Date) September, 1968
Prior month adjustment - No. of days

STATE SERVICE

Any previous state service? ☐ Yes ☒ No If Yes
From: (Dates) (mo. day year) To: (mo. day year)
Name of State Department: Year to date earnings

TEACHERS RETIREMENT SYSTEM

Has this employee ever contributed to the Wisconsin Teachers Retirement System? ☐ Yes ☒ No If Yes
Name of School District Year to date earnings

EDUCATION

College or University Name	From	To	Major	Degree
Claremont Men's College		1960		B.A.
San Francisco State College		1965		M.A.
Claremont Graduate School		1968	Expected	Ph.D.

EMPLOYMENT

Name of Employer: Good Neighbors Abraod, Inc.

From: 1960 To: 4-67 Title of Position: Seminar Director

Rank and or title: Assistant Professor
Teaching Assignment: Political Science
New Position: ☐ Yes ☒ No Replacing: (Name) L. Leonard
Position Number: 11161
Citizenship
Is this employee A U.S. citizen ☐ Yes ☐ No If no

When did he enter this country during his current stay?
Date When will he leave? Date:
Of what country is he a citizen?
What type of visa does he have?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT IN SUPPORT OF MOTION

(Filed May 16, 1969)

* * *

Roger E. Guiles, being first duly sworn, on oath says:

1. I am one of the defendants in the above entitled action, and make this affidavit in support of defendants' motion for summary judgment.

2. I am and have been for the last 9 years the President of Wisconsin State University--Oshkosh. Prior to assuming that position I was Director of Teachers' Education and Dean of Administration at Platteville State College for 17 years.

3. Wisconsin State University--Oshkosh, herein referred to for convenience as the University, has an enrollment of over 11,000 students, and its faculty numbers about 634, of whom about 442 are teachers on one-year appointments who have not yet attained tenure.

4. In June, 1968, plaintiff David F. Roth was appointed to the position of Assistant Professor of Political Science at the University for the academic year commencing September 1, 1968 and ending June 30, 1969. Attached hereto as Exhibit A is a true copy of his appointment, entitled "Faculty Appointment to Wisconsin State University".

5. Plaintiff had never taught nor been appointed to teach at the University prior to September 1, 1968, and had never been employed by the University prior to that date. The only contract or agreement, written or oral, which the University has ever had with plaintiff is that embodied in Exhibit A.

6. On January 29th or 30th, 1969, I determined not to offer plaintiff a re-appointment to the faculty at the University, and accordingly I notified him of my decision by a letter dated January 30, 1969, a copy of which is attached hereto as Exhibit B.

7. I made the decision not to re-appoint plaintiff without consultation with or direction or suggestion from the Board of Regents of State Universities or any member or officer thereof or the Executive Director of State Universities, and neither the Board nor any of those persons participated in the decision to any extent whatever.

8. Neither plaintiff nor anyone on his behalf has ever asked me for an explanation or statement of reasons for my decision not to re-appoint him for another year, and neither he nor anyone on his behalf has asked me for a hearing with respect to my decision.

9. The decision whether or not to offer plaintiff an appointment for another year was made in accordance with the usual and customary procedures in such cases, as set forth in the following paragraphs.

10. At the University, as at all of the State Universities which are subject to section 37.31 (1) of the Wisconsin Statutes, all teachers are initially employed on probation, and employment does not become permanent during efficiency and good behavior until after four years of continuous service in the State University System as a teacher. Teachers who have not thus acquired permanent tenure are normally appointed for only one academic year at a time, which academic year begins September 1 and expires the following June 30. In the case of

each teacher thus employed for a single academic year, the decision whether or not to offer him re-appointment for another academic year is normally made in January, and if the decision is not to re-appoint, the teacher is given notice to that effect on or prior to February 1 of his current appointment, pursuant to the following rules adopted by the Board of Regents of State Colleges, now Universities, on March 10, 1967:

RULE I - February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date.

RULE II - During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

11. At the University the decision whether or not to re-appoint a probationary teacher for another year is made by the president and is made without offering or conducting a hearing, and in case of non-retention, without issuing a statement of reasons for the decision.

12. The normal and customary procedure at the University for determining whether or not to re-appoint a probationary faculty member for another academic year is as follows: As the first step, the tenure committee of the department in which the teacher is employed, which in the department of political science consists of the chairman of the department and the faculty members of that department who have acquired statutory tenure, makes a recommendation of retention or non-retention to the dean having jurisdiction over that department. The dean

then transmits the departmental recommendation, with his own recommendation, and any explanatory statement deemed appropriate, to the vice president for academic affairs, who in turn transmits them with his own recommendation thereon, to the president. The president then makes the decision whether or not to re-appoint the teacher, on the basis of the recommendations and explanatory matter thus transmitted to him and normally without independent investigation of the facts. The president's decision, if against re-appointment, is treated as final and is not transmitted to the Board of Regents for approval or for record.

13. In the case of the plaintiff, David F. Roth, the normal and customary procedure thus summarized was followed in all respects. The tenure committee of the department of political science, in which plaintiff was employed, recommended by a vote of 2 to 1, (2 members abstaining), that plaintiff should not be re-appointed (thus reversing an earlier action in which re-appointment was recommended). Dean Arthur H. Darken of the School of Letters and Science transmitted the departmental recommendation, with his own recommendation that plaintiff be not re-appointed, to Dr. Raymond Ramsden, the Vice-President for Academic Affairs, with a written report setting forth at length his reasons for his recommendation, and an account of the proceedings and action on the matter by the departmental committee; a true copy of which report is attached to this affidavit as Exhibit C. Vice-President Ramsden endorsed his concurrence in the Dean's recommendation on the report and transmitted it to me.

14. My decision not to re-appoint the plaintiff was based entirely on the recommendations of Vice-President Ramsden,

Dean Darken, and the departmental tenure committee and on the matters set forth in Dean Darken's report (Exhibit C), and particularly on the factual matters set forth in section 1 and sub-sections a, b, c and d of section 1 of Exhibit C, which had more weight in my opinion than the matters discussed in section 2 of Exhibit C with respect to plaintiff's public statements.

15. When recommendations with respect to re-appointment or non-reappointment of probationary faculty members are made to me by the vice-president of academic affairs, dean of the appropriate school and the tenure committee of the teacher's department, which are unanimous, it is and always has been my usual practice as president to accept such recommendations and make my decision accordingly, without making a personal investigation of the facts, and without substituting my judgment for that of the vice-president for academic affairs and the dean. In the case of plaintiff, David F. Roth, I followed that customary practice, accepted the statements of fact and recommendations made by the Dean and approved by the Vice-President for Academic Affairs, and decided not to offer re-appointment to the plaintiff. I concurred fully in the opinion of those officers that plaintiff's behavior as set forth in section 1 of the Dean's report, Exhibit A, made it advisable and for the best interests of the University and its students, that plaintiff should not be re-appointed.

16. I deny categorically that my decision not to recommend re-appointment of the plaintiff for another year was motivated to any extent whatever by a purpose or desire to retaliate against the plaintiff for his criticism and expressions of opinion, or to intimidate or harass the plaintiff or any other person. My action was taken solely because in my opinion the facts set forth in the report of Dean Darken supported the judgment of the dean and vice-president for academic affairs, and of the voting majority of the departmental committee on

tenure, that the best interests of the University and its students would be served best by not re-appointing plaintiff for another year.

17. Of the 442 teachers on one-year appointments who have not yet attained tenure, 4 persons were given notice of non-retention. In each of these cases, the normal procedures concerning retention and non-retention were followed.

Dated May 13, 1969.

(Jurat and Execution Omitted)

Exhibit A

(Not Reproduced, See Exhibit A, A. 116-118)

Exhibit B*

January 30, 1969

Dr. David F. Roth
869 Vine Street
Oshkosh, Wisconsin 54901

Dear Dr. Roth:

This is to officially advise you that you will not be invited to serve as a member of the faculty of Wisconsin State University-Oshkosh during the 1969-70 academic year.

I believe you have already been advised of this fact by others and this letter is only intended to make it a matter of record.

Very sincerely,

R. E. Guiles
President

REG:GMS

* Registered mail receipt not reproduced

Exhibit C

28 January 1969

To: President Roger E. Guiles

Through: Vice President Raymond Ramsden

From: Dean Arthur Darken

Subject: Non-retention of *Dr. David Roth,* Assistant Professor of Political Science

1. In my judgment, Dr. Roth has been flagrently guilty of disregarding official responsibilities and duly constituted university authorities.

a. In International Politics, a freshman course, Dr. Roth failed to give a final examination although this is required and although Dr. Roth even announced to the class earlier in the semester that there would be a final examination. It is not a faculty member's prerogative to decide on his own that he will not give a final examination in his sections of one of the department's major freshman courses. The final examination, especially in lower level and freshman courses serves an important purpose and it is not tolerable for a first year faculty member in one of his first teaching assignments to cavalierly decide he won't give a final examination to students and breach a major all-university policy that is in the interest of the students.

b. In International Politics he used from 1/2 to 3/4ths of the class periods during 2 weeks after classes resumed following the riot to discuss the student riot and what the University was or was not doing on the matter, telling students what sorts of protests would follow, etc. He did not, however, urge students to protest or to engage in any improper activities. This summary is based on detailed oral reports by four students enrolled in one of the sections of this class.

This behavior is a clear violation of Article VIII (2) (b) of the Faculty Constitution, which reads, "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject." Whether one shares or does not share Dr. Roth's view of what should be University policy regarding the black students it is still not acceptable for a faculty member to misuse class time in this way. The students were not receiving instruction in international politics, the presumed subject of the course. If this can be done in the service of a liberal cause it can be done also for a reactionary cause. If permitted for one it must, in fairness, be permitted for all. The University wouldn't have a recognizable academic program in this eventuality.

The University recognized the importance of the Black Student riot and the need for student discussion of it by designating the first day of classes after the riot for class teach-ins. Having done this, it is not inappropriate to insist that the remainder of the semester be used for the usual and official purposes of the various courses.

c. Dr. Roth did not meet any of his three classes on Friday, 20 December, the day of the Regents meeting on campus. This was observed personally by Vice President Raymond Ramsden. Dr. Roth, however, attended the Regents session that day. Again, if this is to be overlooked or simply "winked at" because Dr. Roth was casting himself in the role of a "liberal spokesman" the door is opened to all professors to cut their classes whenever they believe one of their personal or social objectives would be served in this way. Faculty are engaged to teach and it is simply not acceptable that they fail to meet classes for such reasons as prevailed here.

There is a regular procedure, the use of the Staff Request for Absence Form, by which faculty can apply for approval of a

proposed absence. Dr. Roth did not bother to use the regular procedure. I couldn't have approved this absence.

By itself, any one of these items (a, b, and c) might not be sufficient to cause me to conclude that Dr. Roth should not be retained, but together it is clear that Dr. Roth's performance has not been acceptable.

d. Dr. Roth was sent a note by Vice President Raymond Ramsden on or about 5 December asking him to meet with the Vice President at his early convenience. The purpose of this meeting was to discuss Dr. Roth's presence at the meeting of students and faculty in C-101 on Thursday, 4 December, at which time the class schedule was disrupted. Dr. Roth did not respond to the Vice President's note, and in fact was quoted indirectly in the *Milwaukee Journal* of 12 December 1968 to the effect that he was disregarding the Vice President's note and request for a meeting. Dr. Roth has not yet responded to Dr. Ramsden's request. Regardless of the fact that Vice President Ramsden was not following the usual chain of command in this instance, it is simply not appropriate for a junior faculty member to be able to disregard a request from the Vice President. It is a breach of authority as well as etiquette.

This series of breaches of official responsibility on the part of Dr. Roth, a first year probationary faculty member, raise serious questions as to his appropriateness as a faculty member. Most departments would not tolerate such behavior.

2. Dr. Roth has made public statements on a number of occasions that indicate a very unscholarly approach to the truth and the search for knowledge that make it doubtful he has the qualities of scholarship desirable in a faculty member. For instance, the 23 December issue of the Paper quoted Dr. Roth as saying, "Many of us feel that the authoritarian and autocratic structure of this university is no longer tolerable."

Yet Dr. Roth did not bother to indicate any areas or instances in which this situation actually existed. Nor has he done so in any of his own recently publicized statements. The statement itself is remarkable for one who has been on the faculty for only 4 months.

In the 6 January issue of the *Paper*, Dr. Roth said the following: "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes." Yet no where in this interview article running to 18 column inches did he actually indicate any appropriate or inappropriate instances in which faculty had been told what to teach or not to teach. The clear implication of the statement and the context was that WSU-O faculty are often subject to prescriptions regarding their freedom to teach their courses and explore varying viewpoints on relevant controversial issues. A scholar has the responsibility to substantiate public statements. And the 9 January 1969 issue of the *Paper* reported that Dr. Roth had instructed students involved in a sit-in outside the President's office that they should not attend a scheduled open meeting of the Advisory Committee for the Culturally Distinct to discuss progress made on the demands of the black students. Instead, Dr. Roth "told students at the Wednesday sit-in to hold another demonstration Friday in the executive offices..." 'We won't talk to any Mickey Mouse committee,' Roth said." In this case Dr. Roth rather clearly seemed to be telling students that it wasn't important to learn what progress the University had made in meeting the black student demands. Instead, the students should proceed with a larger protest sit-in. Such an approach is inconsistent with the responsibilities of a faculty member to encourage students to learn the truth, to examine ideas on their merits, and to mature. If a college professor cannot be expected to encourage a rational approach to a problem of our day, who can be expected to do it?

Such an approach is particularly distressing in view of the fact that the special open meeting of the Advisory Committee had been called and authorized in response to a request from the Concerned Students and Faculty of which Dr. Roth was a leading publicly identified spokesman.

What is involved here is not the freedom of the faculty member to explore competing views in search for the truth in his class or research but the use of unsubstantiated allegations of a grave nature in a tense and possibly inflamatory campus situation. This behavior is not consistent with what the University has a right to expect from a faculty member in the way of scholarship. It is also not consistent with the Faculty Constitution's provisions concerning academic freedom (quoted from the AAUP Statement of Principles on Academic Freedom and Tenure) (Article VIII, (2) (c) "The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

In view of this series of actions by Dr. Roth I cannot in good conscience, as Dean of the School, recommend that he be retained for next year. Dr. Roth has a probationary appointment; he has not demonstrated to my satisfaction that his performance merits his retention; surely we can hire a replacement for Dr. Roth who will follow university policies in regard

to meeting classes, administering final examinations, teaching materials relevant to the course, and demonstrating a greater respect for the truth.

Having considered this series of items carefully, I concluded that I could not concur in the December recommendation of the Political Science Department that Dr. Roth be retained for next year. I also wondered whether the tenured members of the Department had considered or were aware of the items recounted above. I decided, therefore, to discuss the matter informally with the tenured members in order that they could reconsider their recommendation to retain Dr. Roth, if they thought it was appropriate to do so. (The Chairman of the Department, Dr. Willis, was not a tenured faculty member. There were also serious questions regarding granting tenure to Dr. Willis that made it inappropriate to invite him to the informal discussion of Dr. Roth's retention and his own tenure.)

I invited the four tenured members of the Department, Drs. Chang, Goff, Gruberg, and Radell individually to meet with me Friday afternoon, 24 January, to discuss the matter. After presenting the detailed statement in this memorandum to the four tenured individuals in the Department, we discussed the items included and other items brought up by the four tenured members. They concluded that they would like to meet subsequently with the chairman of the department, convene the Tenure Committee, and ballot once again on retaining Dr. Roth. At least three of the tenured members mentioned in our conversation that, quite independently of what I had presented, they had come to have grave reservations about retaining Dr. Roth since the first departmental vote more than a month ago. I stated that if they were going to vote again on Dr. Roth it would have to be done in the next few days because of the State requirement for a 1 February notification of non-retention.

At about 4:00 p.m. on Monday, 27 January, three of the members of the Tenure Committee came to my office to report the results of the vote. They reported that at first the Chairman, Dr. Willis, had refused to convene the committee but, finally, had called it that afternoon. All five members cast their secret ballots in sealed envelopes and gave them to Dr. Goff for opening. The result of the vote was as follows:

2-Not to retain Dr. Roth
1-Retain Dr. Roth
2-Abstain

Consequently, only one member voted in a manner consistent with the original committee vote in mid-December. I am happy, therefore, to be able to make a recommendation that supports the 2-1 vote for non-retention submitted by the Political Science Department's Tenure Committee.

ANNUAL EVALUATION OF NON-TENURED FACULTY MEMBER

This form is not to be used when recommending a non-tenured faculty member for either promotion in rank or tenure.

Name: Roth (Last) David (First) F. (Middle)

Rank: Assistant Professor

Date joined WSU-O faculty: Sept. 1968

Degrees	Schools	Dates conferred
Ph.D.	Claremont Graduate School	June 1968
M.A.	San Francisco State	June 1966
B.A.	Claremont Men's College	June 1960

Years of full time teaching experience: 1

Years of other relevant professional experience: 5 (taught primary; led university students summer seminars)

TEACHING ABILITY:

Factors such as the following shall be taken into consideration when evaluations are made of teaching ability:

1. Adequacy of daily preparation
2. Effectiveness of communication with students
3. Stimulation and sustaining of student interest
4. Gaining and retaining of student respect
5. Maintaining high but reasonable grading standards
6. Enthusiasm for teaching
7. Requiring the writing of papers when appropriate
8. Enrichment and updating of course content
9. Effectiveness of examination techniques and procedures
10. Effectiveness in guiding and inspiring students on an individual basis
11. Success in encouraging qualified students to pursue advanced work
12. Giving instruction which has genuine, relevant, intellectual depth

Dates of class visitations and persons making visits:

December 16, 1968 William Smith, Associate Professor

Evaluation of teaching ability in relation to other members of department. Check one of the following:

☐ Superior ☒ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to teaching ability:

Two new course preparations were undertaken by Dr. Roth this semester. Dr. Smith comments as follows: "Dr. Roth has a pleasnt, relaxed lecturing style. He makes use of up-to-date methodology and is very effective in his use

of illustrations of theories from current events. He manages discussion well and his students seem highly motivated and involved."

_____

_____

_____

EVIDENCE OF PROFESSIONAL AND SCHOLARLY GROWTH:

Factors such as the following shall be taken into consideration when evaluations are made of professional and scholarly growth:

1. Progress toward completion of terminal degree requirements
2. Publications: books, articles, reviews
3. Reading papers at professional meetings
4. Winning of awards and grants
5. Creative and artistic accomplishments
6. Research
7. Evidence of advanced study
8. Attendance at professional meetings

Evaluation of professional and scholarly growth in relation to other members of department. Check one of the following:

☒ Superior ☐ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to professional and scholarly growth:

"Towards a Theory of Philippine Presidential Electoral System," *PJPA* January 1969

"Philippine Presidency and Modernization." Manuscript completed December 17, 1968 to be included as a chapter in book accepted for Publication.

"Who were the Wallace Voters in Oshkosh?" Article preparation. *The Philippine Presidency and Modernization* Manuscript in preparation for Princeton University Press.

Manuscript in preparation for Princeton University Press.
The Arab-Israeli Conflict: Dimensions of Bargaining (in Preparation)
The Making of the Philippine Presidency 1969; (Book in preparation jointly with Ted Becker) Oxford University Press.

EVIDENCE OF SERVICES RENDERED:

Factors such as the following shall be taken into consideration when evaluations are made of services rendered:

1. Service to professional organizations--offices, committees
2. Service to department--committees and special assignments
3. Service to University--Faculty Senate, committees, special assignments
4. Extra-institutional service--speeches, community projects

Evaluation of services rendered in relation to other members of department. Check one of the following:

☐ Superior ☒ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to services rendered:

By-Laws Committee in Department
Talk to Women's Club of Madison (French Political Change) Nov. 21, 1968
Talk to Candlelight Club, Oshkosh
Comments of Chairman: Willingly and ably cooperates in departmental meetings and activities.

OTHER COMMENTS (May be left blank):

Is this faculty member recommended for retention for the coming academic year?

YES x NO

Has the recommendation pertaining to retention (or non-retention) been made in accordance with departmental bylaws? Chairman and tenured members met Dec. 17 and unanimously the group highly recommends reappointment of Roth.

(Dr. Gruberg voted by phone) YES x NO

SIGNATURES: *DATES*

Faculty member being evaluated after having reviewed this form: David Roth 21 December 1968

Chairman of Department Gerry Miller 20 Dec. 68

For non-retention- Darken 8-9 Jan 22 1969

Dean /s/ Arthur W. Darken

I recommend that Dr. Roth not be retained. A.H. Darken, Dean.

See attached comments in support of my recommendations for non-retention.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Not Printed)

PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT AND AFFIDAVIT*

(Filed May 16, 1969)

NOW COMES the Plaintiff, by and through his attorneys, Charles D. Hoornstra and Steven Steinglass, and on the basis of the Affidavit annexed hereto, and the other pleadings herein, moves the Court for a Summary Judgment in any of one or more of the following respects:

1. A judgment that the affiant, as a member of the Wisconsin State University-Oshkosh faculty, is entitled to an impartial hearing on the merits of the decision to not retain him for the school year 1969-1970, notwithstanding that the affiant had been retained originally on a one year contract basis and was non-tenured, and an order requiring the Defendants to provide such a hearing or to offer the affiant a contract as a faculty member for the school year 1969-1970.

2. A judgment that the rights of the affiant as a member of the faculty of the Wisconsin State University-Oshkosh, were violated under the United States Constitution by the failure of the Defendants to decide that he not be retained as a faculty member for the school year 1969-1970 where such decision was not made under ascertainable and definite standards, and an order that the Defendants offer the affiant a contract as a faculty member for the school year 1969-1970.

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*The affidavit of David Roth had attached thereto the memorandum of Arthur Darken to President Guiles (see paragraph 14 of affidavit).

This same document was incorporated as Exhibit C in Appeal Document No. 17 and is not, therefore, reproduced.

3. A judgment for such other and further relief as the Court may deem equitable.

DATED this *16th* day of May, 1969.

(Execution Omitted)

(AFFIDAVIT)

* * *

DAVID F. ROTH, being first duly sworn on oath, deposes and represents the following:

1. That he is the Plaintiff in this action.

2. That he was retained by the Defendants as an assistant professor to teach in the departments of political science and international studies at Wisconsin State University-Oshkosh for the school year 1968-1969, and the Plaintiff performed and continues to perform those duties pursuant to such retention.

3. That the campus at Wisconsin State University-Oshkosh was involved in disturbances and personal clashes concerning the University administration and these Defendants, especially due to violence and turmoil on the campus on November 21, 1968, and the affiant has been vocal in his expressions of opinion with respect to such disturbances and clashes, and such expressions have been critical of the University administrators and these Defendants.

4. That such vocal and critical opinions were frequently reported by the news media in the area of Oshkosh, Wisconsin, and the affiant's primary criticism was that the entire body of black students who were the alleged disrupters of November 21, 1968, should not be expelled or suspended without a determination of individual guilt.

5. That on December 2, 1968, the affiant did not dismiss any class, although he did remove the class from its regularly

scheduled room to a different room, and he did so on the belief that this was part of the instructional program then appropriate for that course.

6. That on December 3, 1968, the Vice President of Academic Affairs, Raymond J. Ramsden, an agent of these Defendants, asked to meet with this affiant; that affiant did so meet on said day; that the discussion at said meeting concerned the correct completion of a form showing student classroom attendance and location of the classroom, and the affiant's presence in the different room on December 2, 1968, described in paragraph 5 herein.

7. That on December 5, 1968 in meeting with about 250 students, the said Raymond J. Ramsden, on behalf of Wisconsin State University-Oshkosh administration, stated that the relationship between the college administration and the students was that of family, the administration being the father and the students being the children, and also that their relationship was that of the military, the administration being the commanders and the students being the troops; and that thereupon the affiant arose in said meeting, announced his identity, and publicly challenged the said Raymond J. Ramsden as to the justice, wisdom, and accuracy of such a relationship view; that the said Raymond J. Ramsden refused to respond to said challenge, but gave the affiant a visible facial "look" which the affiant can only describe as great anger at the affiant.

8. That on December 7, 1968, the said Raymond J. Ramsden again asked the affiant to meet with him, but the affiant declined to so meet on the basis of a directive from the affiant's chairman in the department of political science to not so meet, the chairman expressing the opinion that the requested meeting was merely to harass the affiant for his previously outspoken criticism.

9. That his absence in class on December 20, 1968 was due to sickness, and he gave notice of the same to the chairman of the department of political science.

10. That he did give a final examination in the freshman course in international politics.

11. That he did not devote one-half to three-fourths of his class time in any course to discuss issues not germane to the course of instruction.

12. That his conduct with respect to absence from the classroom, the giving of examinations, and the content of his lectures was based on his good-faith belief that he was acting in compliance with what was customarily expected of faculty members at the Wisconsin State University-Oshkosh.

13. That the affiant has performed his faculty duties reasonably and in substantial compliance with the rules of Wisconsin State University-Oshkosh.

14 That a reason for the decision of the Defendants to not retain the affiant as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970 was affiant's outspoken criticism of the administration of said university, and this reason was admitted to during the course of discovery proceedings in this action on April 28, 1969, by the Defendant, Roger E. Guiles, and by Arthur Darken, an agent of the Defendants, said admissions being made in the presence of this affiant; and said admissions having been incorporated by the said Arthur Darken into a memorandum which was made an exhibit in said discovery proceedings, a copy of said memorandum is annexed to this Affidavit.

15. That the said Arthur Darken admitted in the affiant's presence at said discovery proceedings on April 28, 1969, that his allegations in said memorandum with respect to this affiant's scholarly approach to the truth were based on newspaper reports of what this affiant had allegedly said, and that by "unsubstantiated allegations" he (Arthur Darken) meant to say that the said newspaper reports did not disclose this affiant's basis for criticism, and that he (Arthur Darken) undertook no investigation to determine whether the newspaper failed, negligently or otherwise, to disclose said basis.

16. That on January 28, 1969, Arthur Darken, Dean of the College of Letters and Science, and purporting to speak for the Wisconsin State University-Oshkosh administration, called the affiant to advise him that the affiant would not be retained on the faculty for the school year 1969-1970; that affiant thereupon requested an explanation and reasons for such a decision, and that the said Arthur Darken replied that the affiant was not entitled to an explanation or reasons.

17. That the decision to not retain the affiant was not made under any ascertainable and/or definite standards known to the affiant, nor did the Defendants or their agents provide an impartial hearing as to the merits of the decision to not retain the affiant for the school year 1969-1970.

18. That this Affidavit is made to support the annexed Motion for Partial Summary Judgment.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 27, 1969)

NOW COMES the Plaintiff by and through his attorneys, Steven Steinglass and Charles D. Hoornstra, and submits the Affidavits annexed hereto to oppose the Defendants' Motion for Summary Judgment.

DATED May 26, 1969.

(Execution Omitted)

* * *

DAVID F. ROTH, being first duly sworn, on oath deposes and says:

1. That he is the plaintiff in this action.

2. That he was correctly quoted in the 23 December issue of the *Paper* as saying, "Many of us feel that the authoritarian and autocratic structure of this university is no longer tolerable", and that he substantiated such opinion as to said structure as follows:

a. By noting that the Vice-President of Academic Affairs considered the relationship between the university administration and the students to be analogous to the military, as further described in this affiant's affidavit herein of May 15, 1969, paragraph 7; and

b. By noting that 94 black students had been suspended without a determination of individual guilt according to due process;
and that this affiant also communicated these substantiations to the reporter for the *Paper*.

3. That he was correctly quoted in the 6 January issue of the *Paper* as saying, "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes," and that he did substantiate this statement of opinion by noting that two professors had been required to sign statements about their use of classroom time, and by noting that the Vice-President of Academic Affairs had summoned this affiant with respect to this affiant's use offclass time on December 2, 1968, as more fully described in this affiant's affidavit herein of May 15, 1969, paragraphs 5 and 6.

4. That this affiant at no time instructed students involved in a sit-in outside the President's office that they should not attend a scheduled open meeting of the Advisory Committee for the Culturally Distinct to discuss progress made on the demands of the black students, but rather that this affiant expressed his opinion that such meeting was an attempt by the administration to divert the interested students and faculty from discussing what concerned them most, to-wit: that the 94 black students who had been summarily suspended be immediately reinstated or given a hearing to determine which of them were deserving of punishment, and that this affiant did then recommend that the concerned students and faculty lawfully demonstrate in support of their objective of having the administration discuss the question of such immediate reinstatement in lieu of hearings to determine individual guilt.

5. That this affiant did describe the Committee described in paragraph 1 herein as a "Mickey Mouse" Committee, and did so express his opinion about such committee because of the fact that the defendant Roger E. Guiles withheld from such committee the authority to discuss the question of reinstatement in lieu of hearings.

6. That affiant verily believes that his public utterances which have been critical of the defendants and the administration of Wisconsin State University-Oshkosh have been opinions and statements which are capable of substantiation.

(Jurat and Execution Omitted)

* * *

GEORGE WILLIS, being first duly sworn on oath, deposes and represents as follows:

1. That he is Chairman of the Department of Political Science at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and that he has been Chairman since September of 1968, and that he has been on the faculty of Wisconsin State University-Oshkosh since September 1966.

2. That to the best of his knowledge there is no rule that specifically states that a professor shall not give a take-home final examination in lieu of a two hour classroom written examination.

3. That he consented to David F. Roth giving a take-home final examination at the end of the first semester of the school year 1968-69, and that he so consented under the belief that it was within his jurisdictional powers as Chairman of the Department to grant such permission.

4. That the practice in the Department of Political Science in the case of a professor who cannot attend classes because of illness is that the professor so advise the Chairman or department secretary and that David F. Roth, a member of the Department of Political Science for the school year 1968-1969, did so advise this affiant of an illness that prevented him from properly conducting his classes on December 20, 1968, and that in his opinion the said David F. Roth did appear to be ill on December 20, 1968.

(Jurat and Execution Omitted)

* * *

MANFRED WENNER, being first duly sworn on oath, deposes and represents as follows:

1. That he is the Chairman of the Department of International Studies at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and has been Chairman of such Department for two (2) years, and has been a member of the Wisconsin State University-Oshkosh faculty for three (3) years.

2. That he has no knowledge if there is a rule against take-home final examinations as opposed to two hour written final examinations in the classroom.

3. That to his own knowledge there have been other faculty members who have given take-home final examinations as opposed to two hour written examinations in the classroom.

4. That the practice in his Department of International Studies in the case of a professor who is ill and unable to teach is to notify the secretary of the department who in turn is to notify the students in the particular class.

5. That he, himself, has been ill; that he, himself, has followed this practice of reporting to the secretary that he is ill and unable to attend class, and has never told the Vice-President of Academic Affairs of the same, nor has he ever known that he had a duty to so advise the Vice President of Academic Affairs.

6. That David F. Roth is a member of the Department of International Studies, of which this affiant is Chairman.

(Jurat and Execution Omitted)

* * *

LEON SWARTZBERG, JR., being first duly sworn on oath, deposes and represents as follows:

1. That he is a member of the faculty of Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and has been on such faculty for two (2) years.

2. That he learned that the University rules prohibit take-home final examinations, as opposed to two hour written examinations in a classroom, only after he had been on such faculty for a year and a half (1 1/2); and the source of his knowledge was a casual conversation with another faculty member rather than through any documents or directives issued by the administration of Wisconsin State University-Oshkosh.

(Jurat and Execution Omitted)

* * *

WILLIAM PEDRIANA, being first duly sworn on oath, deposes and represents as follows:

1. That he is a student at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and was a student in the course of International Relations taught by Dr. Roth in the fall semester of the school year 1968-1969.

2. That during said course there was classroom discussion of the events on the campus arising out of this disruption of November 21, 1968, but that the amount of classroom time spent on such subject did not amount from one-half to three-fourths of the classroom time but was in fact substantially less, and furthermore that all discussion of the events of November 21, 1968, and the consequences of those events, were tied into the subject matter of the course by Dr. Roth.

3. That Dr. Roth did give a final examination in this course and that the final examination was comprehensive covering the entire syllabus of the course, although the final examination was not a two-hour written examination in a classroom but was a take-home final examination.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed May 29, 1969)

* * *

David Chang, being first duly sworn, on oath says:

That he is on the faculty of the Wisconsin State University-Oshkosh, Department of Political Science and has been so employed for nine years; that he has in the past served as chairman of this department.

That a by-law of the department provides that a member of the faculty who is not being retained is entitled to a written statement setting forth the reasons for non-retention from the Committee of Tenured Members.

That the chairman upon such a request has the obligation under the by-laws to call a meeting of the tenured members, which includes the chairman as the presiding officer of such committee, to prepare such a statement.

That to his knowledge Dr. Roth has never made such a request of the chairman, Dr. George Willis, for no meeting of the tenured members has been called by Chairman Willis to prepare such a statement.

That on friday, January 24, 1969, he attended a meeting in Dean Darken's office with the tenured members of the Political Science Department and was informed at that time of the Dean's reasons for not recommending retention of Dr. Roth.

That subsequently, on January 27th, 1969, he attended an Ad Hoc meeting of the entire faculty of the Department with the exception of two tenured members; that Dr. Roth and chairman Willis were present at this meeting.

That the purpose of this meeting was to inform the Political Science Department faculty as to what information had been given to the tenured members by the Dean at the prior meeting of the tenured members.

That many of the Dean's reasons for not recommending the renewal of Dr. Roth's contract were brought out at this meeting in the presence of Dr. Roth; That Dr. Roth had every opportunity at this time to be informed as to the reasons supporting The Deans recommendation.

That Dr. Roth has subsequently asked some of the tenured members of the department for a written statement on the reasons for non-retention, such a statement has not been given to Dr. Roth for under the by-laws only the chairman of the department may call the necessary meeting of the tenured members and such a meeting has not been called for by the Chairman.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION

(Filed May 29, 1969)

* * *

Richard White, being first duly sworn, on oath says:

1. That this affiant was a student in Dr. Roth's class in International Politics for the school year 1968-69 meeting at 1:30 on Mondays, Wednesdays, and Fridays.

2. That on December 2, 1968, Dr. Roth advised his 1:30 class in International Politics that he was going to attend the meeting between President Guiles and the parents of the black students and that anyone who wanted to could go along.

3. That this affiant was asked by Dr. Roth on a Monday in early December, 1968, to announce to Dr. Roth's 1:30 Wednesday class in International Politics that he would not meet his Wednesday class and that he would be attending a meeting in Madison.

4. That subsequent to the events of November 21, 1968, Dr. Roth spent at least 50% of this class time on discussing the Black issue and that most of these discussions were initiated by Dr. Roth.

5. That this affiant was told by Dr. Roth on two or three occasions that there would not be a final exam and that the only "final exam" consisted of a project assignment which assignment had been made early in the school year; that this affiant was graded on: homework assignments, mid-term take home exam, class discussion, project assignment which was in the nature of a group term paper.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION

(Filed May 29, 1969)

Kristine Dorow, being first duly sworn, on oath says:

1. That affiant was a student in Dr. Roth's class in International Politics for the school year 1968-69 meeting at 1:30 on Mondays, Wednesdays, and Fridays.

2. That Dr. Roth announced to his 1:30 class in International Politics on December 2, 1968, that the class could either stay in the classroom or go to the meeting between President Guiles and the parents of the suspended black students; that the majority of the class wanted to attend this meeting; that the meeting between President Guiles and the parents was held in Wisconsin Room in the student Union and that many of the students from Dr. Roth's class left and did not attend the meeting in the student Union.

3. That on December 20, 1968, affiant attended the 1:30 class of Dr. Roth's in International Politics and that Dr. Roth never appeared nor did anyone else appear on his behalf to advise the class that Dr. Roth would not be present; that on three or four prior occasions Dr. Roth missed his class without notice to the class and that on such occasions the class waited ten minutes and then left.

4. That subsequent to November 21, 1968, Dr. Roth spent at least three quarters of the class time in International Politics on the discussion of the Black problem and that he initiated such discussions and encouraged the class to initiate such discussion.

5. That the only "final exam" consisted of a group term paper project that had initially been assigned approximately late September, 1968.

Dated May 27, 1969

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION

(Filed May 29, 1969)

* * *

RAYMOND J. RAMSDEN, being first duly sworn on oath deposes and says:

That attached hereto is a true and accurate copy of the 1968-1969 Faculty Handbook which sets forth the practices of the Wisconsin State University-Oshkosh pertaining to Testing and Dismissal of Classes which have been in effect during the 1968-1969 academic year.(*)

Affiant is employed at the Wisconsin State University-Oshkosh and has held the position of Vice President-Academic Affairs or predecessor position since about 1959, and that in making his recommendation that Dr. Roth not be retained, he at no time based such recommendation or was in any way motivated in making such recommendation by Dr. David F. Roth's criticism of the school administration.

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* Not printed

Attached to this affidavit is a notice to the faculty that a teach-in was authorized by the University administration for December 2 on the subject of the Black problem. The intent of the notice is plainly to make provision for discussion of this subject in the classroom. In my opinion Dr. Roth violated the clear intent of the notice and exercised poor judgment in taking his class to the Union to attend what could have been a volatile meeting between the parents of Black students and the University President.

Dated May 27, 1969.

(Jurat and Execution Omitted)

(Attachment to affidavit)

Approved by the Executive Council, consisting of the President, the Vice Presidents, and all the Deans on 27 November 1968

November 27, 1968

To: Executive Council

From: Dave Frank, Student Body President

Re: Student Senate Resolution on Teach-in

The Student Senate, in action taken on November 26, 1968, has called for Monday, December 2, to be set aside by the students and the teaching faculty as a day for teach-in on the present University crisis regarding the actions of black students on November 21 and the full implications of these actions.

THE PLAN

1) All classes meet Monday as scheduled.

2) In classes where both the instructor and the students agree, regular course material would not be discussed. Instead, a general discussion might take place on anything relative to the purposes of the teach-in. Possible discussion topics are:

a) What are the important aspects of the situation? legalistic, humanistic, etc.

b) What actions should be taken by the University, as a community in itself, to promote the best interests of the University, the students arrested, and society in general?

c) What should we at Oshkosh do to bring the black and white cultures together in such a way as to promote mutual understanding?

3) The class teach-ins could be followed by a large teach-in Monday night held in Albee Hall or the Little Theater and conducted by selected faculty. (This is still under discussion.)

Teach-In
Page 2

REASONS FOR AND POSSIBLE RESULTS OF THE TEACH-INS

Reasons for and possible results of the teach-ins are:

1) The development of a sense of unity and direction within the University relative to race relations;

2) The development of a base for continuing discussion and consideration of the problems;

3) The development of a foundation of understanding which may offset, to a good degree, the probability of serious immediate and future violence on our campus;

4) The founding of a base for developing understanding in the community of Oshkosh and improving the now seriously wounded University-community relations; and

5). The use of teach-in as an auxilliary approach for meeting the University's commitments to provide solutions for social problems.

COMMENTS

Discussion is also under way on a proposal for a teach-in for the public community. Such a teach-in might take place in one or two weeks and could be held in the Grand Theater and conducted by selected faculty and/or students.

Anything which can be done next week, and particularly Monday, to promote a casual and relaxed atmosphere is worth a try; we feel that in-class teach-ins are one such effort and should be attempted now with all deliberate speed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID F. ROTH, for himself and
for all others similarly situated,
Plaintiff,

v. 69-C-24

THE BOARD OF REGENTS OF STATE
COLLEGES AND ROGER E. GUILES,
Defendants.

MEMORANDUM AND ORDER

(Entered Mar. 12, 1970)

From the pleadings, depositions, and affidavits on file, I find that there is no genuine issue as to the following material facts:

Plaintiff was retained by the defendants as an assistant professor at Wisconsin State University-Oshkosh on a one-year contract for the school year 1968-1969. He had not attained tenured status under Wisconsin statutes. During the 1968-1969 school year at the university, there were disturbances and controversies concerning the university administration and the defendants. The plaintiff was vocal in his expressions of opinion with respect to such disturbances and controversies. Such expressions were critical of the university administrators and the defendant board of regents. The plaintiff was advised on January 30, 1969, by the defendant Guiles, the president of the university, purporting to act under due authority, that the plaintiff would not be offered an employment contract as a member of the university faculty for the school year 1969-1970; no reasons for the decision were given. The defendants did not offer the plaintiff a hearing of any kind on the merits of the decision. No hearing was requested by him; none was held. Of 442 non-tenured teachers at the university, four were given notice that contracts would not be offered them for 1969-1970.

The complaint alleges, among other things, that the reason for the decision not to offer plaintiff a contract for 1969-1970 was to retaliate against him for his expressions of opinion in the exercise of his freedom guaranteed by the First and Fourteenth Amendments; that the decision was not made under "ascertainable and definite standards governing the Defendants in making this decision"; and that the decision has caused and will cause damage to plaintiff's professional reputation and

standing. The complaint seeks judgment that plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution have been violated: by the very decision not to re-employ him; by failure of the defendants to provide a hearing as to the merits of said decision; by the refusal of the defendants to give reasons for their decision; and by defendants' failure to make such decision under ascertainable and definite standards. Further, the plaintiff's complaint seeks an order directing the defendants to employ him in his position as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970.

Among other things, the answer denies that the reason for the decision was to retaliate against plaintiff for his expressions of opinion, alleges that the reasons for the decision were that the plaintiff was guilty of substantial neglect and violation of duty, violation of university rules, and insubordination, denies that this court enjoys jurisdiction of the action, and alleges that the complaint fails to state a claim upon which relief can be granted.

Plaintiff has moved for partial summary judgment declaring that he is entitled to a hearing on the merits of the decision not to retain him, and requiring the defendants either to provide such a hearing or to offer him a contract for the 1969-1970 school year; and also, apparently in the alternative, declaring that his constitutional rights have been violated because the decision of non-retention was not made under ascertainable and definite standards, and requiring the defendants to offer him a contract for the 1969-1970 school year.

Defendants have moved for summary judgment dismissing the action on its merits because the complaint fails to state a

claim upon which relief can be granted, because the undisputed facts show that no federal constitutional right of plaintiff has been violated by defendants, and because plaintiff has failed to exhaust his administrative remedies.

This opinion and order is confined to the competing motions for summary judgment.

Jurisdiction is present. 28 U.S.C. § 1343(3), (4); 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment

Defendants raise, directly or indirectly, three threshhold questions: whether defendants are "persons" within the meaning of 42 U.S.C. § 1983; whether defendants enjoy the protection of sovereign immunity; and whether defendants enjoy common law immunity.

Neither defendant is a municipal corporation. See *Monroe v. Pape*, 365 U.S. 167 (1961). This is an action for declaratory and injunctive relief, not damages. See *United States ex rel. Lee v. State of Illinois*, 343 F. 2d 120 (7th cir. 1965); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585, 587 (7th cir. 1961). For the purposes of this action, defendants are "persons" under 42 U.S.C. § 1983.

Neither the Eleventh Amendment nor the doctrine of *Hans v. Louisiana*, 134; U.S. 1 (1890) affords these defendants the shield of sovereign immunity in this action for declaratory and injunctive relief in which it is alleged that, acting under color of state law, they have deprived plaintiff of rights secured to him by the Constitution of the United States. *Ex parte Young*, 209 U.S. 123 (1908); *Whitner v. Davis*, 410 F.2d 24 (9th cir. 1969); *Baker v. Louisiana State Board of Education*, 339 F.2d 911 (5th cir. 1964); *Board of Supervisors of Louisiana State*

University v. Fleming, 265 F.2d 736 (5th cir. 1959); *Orleans Parish School Board v. Bush*, 242 F.2d 156 (5th cir. 1957), cert. den., 356 U.S. 969; *School Board of City of Charlottesville v. Allen*, 240 F.2d 59 (4th cir. 1956), cert. den. *School Bd. of Arlington County v. Thompson*, 353 U.S. 910; *Dorsey v. State Athletic Commission*, 168 F. Supp. 149 (E.D. La. 1958), aff'd 359 U.S. 533.

The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended in a qualified form to the defendant Board and university president, is to preserve the integrity and independence of those bodies, and to insure that judges and legislators will act on their free, unbiased convictions, uninfluenced by apprehensions of consequences. *Tenny v. Brandhove*, 341 U.S. 367 (1951); *Bauers v. Heisel*, 361 F.2d 581 (3rd cir. 1966), cert. den., 386 U.S. 1021; *Kenney v. Fox*, 232 F. 2d 288 (6th cir. 1956), cert. den., 352 U.S. 855. Such considerations do not support extending, nor have courts extended, the doctrine to shield officials from the type of equitable relief here requested.

We reach the major grounds of defendants' motion for summary judgment of dismissal.

The defendants' principal contention is to this effect: Plaintiff was hired for a one year period: There was no breach or threatened breach of that contract by the defendants. As a non-tenured teacher, plaintiff can be removed "at pleasure" under Sec. 37.11(3), Wis. Stats. Such complete discretion in defendants is essential to keep the faculty at the "highest level of competency, responsibility, and devotion to duty". The administrative decision not to rehire can be reached for "no reason or any reason". It follows that no statement of reasons need be given, nor hearing offered.

If a decision not to renew the employment contract of a non-tenured university professor may be based consciously and deliberately on the fact that he has written a scholarly letter to the newspaper in support of the President's policy on Viet Nam, or on the fact that he is white, or on the fact that he is a Protestant, or on the fact that he is a Republican, and if the decision may be based on the university president's belief that the professor physically struck a student at a certain time and place, whereas in fact the professor was not present at that time and place and the incident never occurred, and if there need be no reasoned basis whatever for the decision, then it may be concluded that the Constitution of the United States affords him no substantive protection. If he enjoys no substantive protection under the Constitution - that is, if the decision not to renew may be based upon any reason or may be based upon no reason - then it also follows that he need be afforded no procedural protection by the Constitution; to require the university administration to state the reason for the decision, or to state that there is no reason for the decision, or to provide an opportunity to the professor to be heard, would serve no purpose.

On the other hand, if the Constitution of the United States forbids a decision consciously and deliberately based on the professor's otherwise protected speech activity, or his race, or his religion, or his political affiliation, then this substantive right may require procedural protection. (For the purposes of this opinion, for convenience and brevity, I will refer to an alleged right of this kind as a "First Amendment" right, although this does not accurately reach the matter of racial discrimination, for example.)

Also, if the Constitution forbids a decision based upon a wholly false assumption (for example, that the professor struck

the student), or if it forbids a decision which is wholly unreasoned, then this substantive right may also require procedural protection. (For convenience, I will refer to an alleged right of this kind as a right to be protected against an "arbitrary" decision.)

With respect to substantive protection of a professor's "First Amendment" rights, the rule is crystal clear. The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605, 606 (1967); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th cir. 1968), *Bomar v. Keyes*, 162 F.2d 136 (2d cir. 1947), cert. den. 332 U.S. 825. This substantive constitutional protection is unaffected by the presence or absence of tenure under state law. *Johnson v. Branch*, 364 F.2d 177 (4th cir. 1966), cert. den. 385 U.S. 1003; see *McLaughlin v. Tilendis, supra; Bomar v. Keyes, supra; Lucia v. Duggan*, 303 F. Supp. 118 (D. Mass. 1969). Nor is it material whether employment is terminated during a given contract period, or not renewed for a subsequent period. *McLaughlin v. Tilendis, supra.*[1/]

With respect to substantive protection against arbitrary non-retention, there is some uncertainty in the present state of the law. To test the point, we must assume a situation in which there is in fact no "First Amendment" problem; that is, the basis for non-retention is definitely not that the professor has exercised that freedom secured to him by the Constitution. The

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1/ Because this distinction is not material in this Circuit for this constitutional purpose, I will use the term "non-retention" hereinafter to cover both situations.

question, then, is whether the Fourteenth Amendment permits non-retention on a basis wholly without factual support, or wholly unreasoned.

The most recent guidance from the Supreme Court appears to be *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960). Rachel Brawner was employed as a cook by a private firm which operated a food concession on the premises of the Naval Gun Factory. Access to the Factory grounds depended upon an identification badge. Mrs. Brawner was required by the government's security officer to turn in her pass. The stated reason was that she had failed to meet the security requirements of the installation; no more specific reason was stated. There was no hearing provided. The effect of surrendering the badge was to lose access to the site of Mrs. Brawner's job as a cook.

The Court stated that it was required first to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895. The private interest affected "most assuredly was not the right to follow a chosen trade or profession. . . . Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her then private employer] or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S., at 895-896. On the other hand, the governmental function involved was "as proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S. at 896.

There follows a puzzling passage (896-899) in which the Court appears initially to affirm "a settled principle that government employment, in the absence of legislation, can be

revoked at the will of the appointing officer" (896); then to acknowledge that *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Wieman v. Updegraff*, 344 U.S. 183 (1952) demonstrate "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer" (897-898); then to say that not all state and federal employees "have a constitutional right to notice and a hearing before they can be removed" (898); then to "assume" that Mrs. Brawner "could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory - that she could not have been kept out because she was a Democrat or a Methodist" (898); and then to say that it does not follow "that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract" between the government and her private employer (which contract provided that the private firm should not continue to employ on that site persons who failed to meet the government's security requirements) (898). Finally, the Court concluded that a determination that Mrs. Brawner "failed to meet the particular security requirements of that specific military installation" was not to "bestow a badge of disloyalty or infamy" upon her, and was not to impair her opportunities for employment elsewhere either by a public or private employer. (898-899).

Four members of the Court, in dissent, observed that the Court had recognized that Mrs. Brawner's job as a short-order cook at a Gun Factory was constitutionally protected against termination "on grounds of her race, religion, or political opinion", but had seemed to say that "mere assertion by government that exclusion is for a valid reason forecloses further inquiry." 367 U.S., at 900. The dissenters expressed the view

that Mrs. Brawner was entitled to some minimal procedures to apprise her in some detail of the reason for removing her badge, and to give her some opportunity to defend. Finally, the dissenters disagreed with the Court's estimate of the future consequences to Mrs. Brawner flowing from being characterized as a "security risk." 900-902.

In the present case I consider myself bound by *Cafeteria Workers v. McElroy* to undertake the balancing process described there: that is, to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895.

Turning first to "the precise nature of . . . the private interest . . . affected," I start with the Court's observation that Mrs. Brawner's interest was "the opportunity to work [as a short-order cook] at one isolated and specific military installation." 367 U.S., at 896. The significance of the terms "isolated" and "specific" in this context is not easily grasped. Apparently the Court meant to contrast the termination of Mrs. Brawner's employment at the Gun Factory, with an order excluding her from employment as a short-order cook on the sites of all military installations, or to contrast it with an order revoking the license of a lawyer or a medical doctor or a real estate broker. The underlying significance appears to be that the effect of the termination was not seriously to limit Mrs. Brawner's future economic opportunities. The interest of the plaintiff here might also be viewed as "the opportunity to work [as a professor] at one isolated and specific university." The termination of this opportunity might also be contrasted with an order excluding him from employment at all universities and colleges, or with the revocation of the license of a lawyer or medical doctor or real estate broker. But the parallel with Mrs. Brawner's case falters here because the relationship between one cook and all

prospective employers of short-order cooks differs, as I now judicially notice, from the relationship between one university professor and all prospective employers of university professors. Without disrespect, I think it fair to say that the discharge from one job is a lesser impediment in the search for another in the case of short-order cooks than in the case of university professors.

Turning to "the precise nature of the government function involved," I start again with the Court's observation in *Cafeteria Workers v. McElroy*. It found the government function there to be:

> "[A]s proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S., at 896.

The emphasis here seems to be that the government function involved was proprietary rather than regulatory; that it was one of internal operation of an establishment; that the establishment was important; that it was military; and that there is a tradition of unfettered control by the federal government over its proprietary military installations. The interest of the state government in the present case is also proprietary rather than regulatory; it involves the internal operation of an establishment; and the establishment is important. The establishment is educational in nature, rather than military. Whether in its proprietary educational capacity the state government "has traditionally exercised unfettered control" is a question not instantly answerable. It seems fair to say, however, that historically the governance of public institutions of higher learning by the state has been less authoritarian than the governance of miliary installations by the federal government.

But to give effect to the balancing test of *Cafeteria Workers v. McElroy* obviously requires more than literal application of its language to the present situation, and more than labored comparisons between short-order cooks and professors, and between federal gun factories and state universities. We are dealing here with institutions of higher learning in this country, and perhaps abroad, and we are dealing with professors in those institutions.

I am called upon to consider the interest of the university in assembling and preserving a community of teachers and scholars. I am to consider how vital it is to this interest that during a relatively short initial interval, the university be free arbitrarily to decide not to retain a professor, so long as its decision is not based upon his exercise of freedoms secured to him by the Constitution. The concept of tenure obviously enjoys a rational basis, as well as a traditional basis. It is reasonable that there be a time in which to observe a new teacher and scholar and that the university retain during that time a considerable latitude in deciding whether he should remain. It is reasonable that after a period of time, or after the newcomer has won a certain measure of acceptance reflected in his academic rank, he should acquire rather strong protection against non-retention; such an arrangement is conducive to productive and perhaps controversial effort. Thus it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues. And it is reasonable that thereafter this available spectrum of reasons be sharply narrowed and confined to those amenable to articulation or demonstration.

The core issue here, however, is more difficult. No interest of the university is directly served by a regime in which a

decision not to retain a newcomer may be made upon a basis wholly without support in fact or by a decision upon a wholly unreasoned basis. If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between tenure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.

As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason, whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.

The balancing test of *Cafeteria Workers v. McElroy* compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason. This standard is intended to be considerably less severe than the standard of "cause" as the latter has been applied to professors

with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons.

In deciding to afford to professors in a state university substantive protection against arbitrary non-retention, I am strengthened by an awareness that this is consistent with the development of the law with respect to public employment generally. The time is past in which public employment is to be regarded as a "privilege" which may be extended upon any conditions which public officials may choose to impose. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Davis, the Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 234 (1956). In *Birnbaum v. Trussel,* 371 F.2d 672, 678 (2d cir. 1966), after a review of the decisions of the Supreme Court and other courts, it was said that the "principle to be extracted from these cases is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist."

The latter comment brings me to a conclusion which follows inexorably from what I have said. Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of

the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place.[2]/ At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[3]/

I conclude that the defendants' motion for summary judgment dismissing this action must be denied for the reason that it is undisputed that no statement of reasons for non-retention was given to the plaintiff, and no notice was given him that he would be heard at a stated time and place in response to the stated reasons.

Defendants' motion must be denied for another reason. They contend that the record in this court - by affidavits, depositions, and pleadings - makes it clear that the decision not to retain this particular plaintiff enjoyed a basis which was

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[2] I do not intend to foreclose more considerate procedures, which permit the professor to waive procedural rights, voluntarily and knowingly. For example, the initial notice that non-retention is being considered may say that if the professor makes a written request, within a stated interval, a written statement of reasons will be supplied him, and that he will be provided with hearing at which he may respond; otherwise, he will simply be furnished with a letter announcing the decision without a statement of reasons. Also, even at the point at which a written statement of reasons is furnished, the professor may be advised that, if he makes a request for a hearing within a stated interval, a hearing will be scheduled; otherwise, the procedure will end with the written notice of non-retention and the reasons therefor.

[3] It should clearly be understood that any more stringent requirements imposed by statute, custom, or otherwise, such as a showing of "cause" in the case of a tenured professor, are unaffected by this statement of minimal procedural requirements embodied in the due process clause of the Fourteenth Amendment.

reasoned, supported in fact, and not violative of plaintiff's freedom of expression.

Defendants offer *Pickering v. Board of Education*, 391 U.S. 563 (1968), in support of the contention that plaintiff's statements referred to in section 2 of Dean Darken's memorandum (upon which memorandum defendant Guiles relied in deciding not to retain plaintiff) were not entitled to First Amendment protection. In *Pickering* the unsuccessful Board contended that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." *Pickering, supra*, at 568-569. Defendants make a similar argument here.

In "evaluating the conflicting claims of First Amendment protection and the need for orderly school administration", the court in *Pickering, supra*, "indicates some of the general lines along which an analysis of the controlling interest should run." *Pickering, supra*, at 569. Those guidelines coupled with certain controverted facts prevent summary judgment based upon this contention.

A teacher's freedom of speech cannot be limited unless it can be shown that his utterances harm a substantial public interest. *Pickering, supra*, at 570-571. The defendants have not exhibited beyond dispute that such injury existed. It is not uncontroverted that the plaintiff's statements diminished his effectiveness in the classroom, hampered the administration's disciplinary actions, or furthered the disturbances and disorder already occurring on the campus.

Even if it were agreed that the plaintiff's utterances were inaccurate and unsound, it is clear from *Pickering* that a factual evaluation of their consequences would become necessary.

"What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S., at 572.

Defendants argue that even if the statements of the plaintiff are constitutionally protected, section 2 of [t]he Dean's report did not disapprove of them because they were critical of university administration, but only because they were unsubstantiated and evinced an unscholarly approach to the search for knowledge and truth. The plaintiff has alleged, and it is controverted, that the defendants relied on the public statements for more than the proposition that plaintiff was unscholarly. Plaintiff supports his argument with the contention that the defendants have presented no additional evidence which calls his competence into question. Further, he contends that the statements cited in the Darken memorandum are statements of opinion as to then existing conditions which cannot be subjected to the tests of scholarship. Factual error ordinarily affords no warrant for repressing speech otherwise free. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), motion for rehearing denied 376 U.S. 967. Whether error is to be accorded special significance here will require an evaluation of the setting in which it occurred, if it was indeed error.

Defendants further contend that the defendant Guiles in making his decision of non-retention relied upon ample non-constitutionally protected activity as set forth in section one of

Dean Darken's recommendation. This is put in dispute by the following allegations of the plaintiff:

> the defendant Guiles' decision of non-retention was based upon both sections one *and* two of Dean Darken's recommendation;
>
> even if the decision was based solely upon section one recommendations, the complaints there enumerated were only brought to light and used because of the plaintiff's criticism of university administration; and
>
> apart from the recommendation, defendant Guiles' decision was an attempt to retaliate against the plaintiff for his critical comments.

Both parties seem to agree that "a justifiable ground of discharge is not a defense when the" ground "is a *mere pretext* and not the moving cause of the discharge" (Defendants' Reply Brief in Support of Defendants' Motion, at p. 7; underlining in the original). The plaintiff has so alleged and should be allowed to attempt to prove it. Obviously, a non-retention decision based upon activity which is not constitutionally protected, is a valid decision. But a decision based in part on protected activity and in part upon unprotected activity is not a valid decision. In the present case it appears that a determination as to the actual bases of decision must await amplification of the facts at trial. *Beilan v. Board of Education*, 357 U.S. 399, 412 (1958) (Warren, C. J., dissenting). Summary judgment is inappropriate.

Plaintiff's Motion for Partial Summary Judgment

There is a contrast between the relief sought in the complaint herein and the relief sought in the plaintiff's motion for partial summary judgment.

The allegations of the complaint embody an attack on the non-retention decision on both substantive and procedural grounds. The substantive grounds alleged are that the decision was based upon plaintiff's earlier expressions of opinion, and that there were no ascertainable and definite standards upon which the decision could be based.[4] The procedural grounds alleged are that the defendants refused to give reasons for their decision, and that they did not offer the plaintiff a hearing on the merits of the decision. The relief asked is a declaratory judgment with respect both to the substantive and procedural grounds, and an injunction requiring defendants to offer the plaintiff a contract for the 1969-1970 academic year.

The motion for a partial summary judgment, however, prays apparently in the alternative: (a) that defendants either provide plaintiff with a hearing on the merits of his non-retention or offer him a contract for 1969-1970; or (b) that defendants offer him a contract for 1969-1970 because the non-retention decision was not made on any ascertainable and definite standards. Thus the motion for summary judgment introduces a prayer for an order to compel defendants to provide procedural safeguards within the university.[5]

Plaintiff might have elected to come here under 42 U.S.C. § 1983 and to seek only an order compelling defendants to offer him a contract for 1969-1970, alleging that the non-retention decision had actually been based on his exercise of First Amendment freedoms, and that there were no ascertainable rules and regulations of conduct governing faculty members upon which

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[4] Perhaps the contention concerning the absence of ascertainable and definite standards may be described as procedural rather than substantive. I understand the contention to be that there had not been made known to the plaintiff, in advance, rules and regulations sufficiently definite and specific to serve as a guide to conduct. I compare this with contentions that substantive rules of conduct are vague or overbroad.

[5] Since the complaint includes a prayer "for such other and further relief as may be equitable," the plaintiff is not foreclosed from seeking this specific relief in his motion for a partial summary judgment.

the non-retention decision could have been based. Had he done so, he would not have been required to exhaust whatever state administrative or judicial remedies might have been available to him. *Damico v. California*, 389 U.S. 416 (1967).

On the other hand, plaintiff might have elected to come here under 42 U.S.C. § 1983, allege that he had been given no reasons for his non-retention and had been afforded no hearing on the merits of the decision, and to seek only an order compelling the defendants to provide him with these procedural safeguards within the university.

In this situation, I will consider first that alternative motion by the plaintiff for partial summary judgment in which he seeks an order compelling defendants to offer him a contract for 1969-1970 on the ground that the non-retention decision was not made on any ascertainable and definite standards. The motion must be denied. The contention appears to be that a non-tenured employee is constitutionally entitled to be told in advance that if he does not comply with certain reasonably specific standards of conduct, he will not be offered a contract for the following year. See *Soglin v. Kauffman*, 418 F.2d 164 (7th cir. 1969) (relating to students in a public university). The necessary implication is that if he does abide by these previously announced standards of conduct, he will be entitled to a contract for the following year. As I have explained above in discussing defendants' motion for summary judgment, it is important that in deciding whether to retain a non-tenured professor, the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of his First Amendment rights. To accept the plaintiff's contention would be to erect a constitutional requirement even more severe than the showing of "cause" now required by Wisconsin law in the case of tenured professors. So far as the federal constitution is concerned - as distinguished

from state statutes, regulations, collective bargaining agreements, or traditions - I have held that due process affords professors (tenured or non-tenured) protection only against non-retention based on their exercise of constitutional freedoms and against non-retention based on arbitrariness. To provide this limited protection it is not necessary to require that the university enunciate in advance a code of conduct for professors, violation of which will result in non-retention and compliance with which will result in retention.

This brings me to the remaining alternative motion by the plaintiff for a partial summary judgment: that defendants be compelled either to provide him with a hearing on the merits of his non-retention or to offer him a contract for 1969-1970. For reasons stated in my discussion of defendants' motion for summary judgment, I have concluded that this alternative motion must be granted, with modifications. That is, upon the facts not in dispute, I believe that as of January, 1969, the plaintiff was constitutionally entitled to be provided with a statement of the reasons why he was not to be retained for the year 1969-1970, to be given notice of a specific time and place for a hearing at which he could respond to the stated reasons, and to be given the hearing itself if he appeared at the stated time and place; in the absence of being provided these procedural safeguards, he was entitled to be retained in 1969-1970. Because of the passage of time while this action has been pending in this court, the relief must be modified somewhat, and the specific order of the court is as stated below.

Because the plaintiff is being furnished the procedural relief which he has sought in his motion for partial summary judgment, I stay further proceedings in this court on what appear to be the only remaining issues: whether in fact non-retention was based upon plaintiff's earlier expressions of opinion or was arbitrary. If the plaintiff is now furnished with

a statement of the reasons for his non-retention, notice of an administrative hearing, and a hearing, I believe that the remaining issues in this case will have been clarified and that they will become more amenable to resolution.

Order

It is ordered that defendants' motion for summary judgment is hereby denied.

It is ordered that plaintiff's motion for a partial summary judgment that his rights were violated by defendants' decision not to retain him for the school year 1969-1970 because said decision was not made under ascertainable and definite standards, and for partial summary judgment that defendants be ordered to offer him a contract as a faculty member for the school year 1969-1970 (or any subsequent time), is hereby denied.

It is hereby ordered and adjudged that on or before March 20, 1970, the defendants herein are to cause to be delivered to counsel for the plaintiff herein a written statement of the reasons upon which the defendants relied in deciding not to offer plaintiff a contract for the 1969-1970 academic year; that on or before March 20, 1970, plaintiff's attorneys are to inform defendants' attorneys in writing of all dates after April 1, 1970, and prior to June 30, 1970, upon which plaintiff would be able to appear for a hearing in Oshkosh, Wisconsin; that on or before March 27, 1970, defendants are to cause to be delivered to counsel for the plaintiff herein a notice of a hearing at an appropriate place in Oshkosh, Wisconsin, on a date which is among those designated by the plaintiff and which is not less than ten days subsequent to the date on which notice is delivered to plaintiff's counsel; that said notice is to advise the plaintiff that at the specified place and time, he will be given

an opportunity to respond to the reasons stated for his non-retention; that at the said time and place, if plaintiff appears, he will be given an opportunity to respond to the reasons stated for his non-retention; that within 15 days after the date of said hearing, the defendants will notify plaintiff's counsel herein either that he will not be offered a further contract with the university or that he is being offered a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969. It is hereby further ordered and adjudged that should the defendants elect not to comply with the immediately preceding order by providing the plaintiff with a statement of reasons for his non-retention, notice of hearing, and hearing, then the defendants shall be required, on or before June 1, 1970, to offer the plaintiff a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969.

Entered this *12th* day of March, 1970.

(Execution Omitted)

IN THE

United States Court of Appeals

For the Seventh Circuit

September Term, 1970 — September Session, 1970

No. 18490

DAVID E. ROTH, for himself and for all others similarly situated,
Plaintiff-Appellee,

v.

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

JULY 1, 1971

Before DUFFY, *Senior Circuit Judge*, FAIRCHILD and KERNER, *Circuit Judges*.

FAIRCHILD, *Circuit Judge*. In this case (involving an official decision at a state university not to reemploy a non-tenured professor) the parties each made motions for summary judgment. The district court decision is reported at 310 F Supp. 972. Defendants' motion was denied, and plaintiff's motion was granted in part. The order appears on pages 983 and 984. Defendants have appealed from the judgment accordingly entered. Although such judgment did not finally dispose of all issues, and no direction was made under Rule 54(b) F.R.C.P., it amounted to an injunction, and was appealable as such under 28 U.S.C. §1292(a) (1).

The facts, the disposition of the motions, and the reasoning employed are well stated in the opinion of the district court, and we shall avoid unnecessary repetition. It suffices, now, to say that during the school year '68-'69, plaintiff was a non-tenured professor at a state university who claimed (1) that the reason for defendants' decision not to retain him for the school year '69-'70 was to retaliate for plaintiff's constitutionally protected expression of opinion and (2) that even as a non-tenured member of the faculty he was constitutionally entitled either to be retained or to be given a hearing on the merits of the decision not to retain him.

With respect to issue (1), which may be termed substantive, the district court decided there were issues of fact. Such issues have not been determined and the respective claims concerning them are before us only as background. With respect to issue (2), which may be called procedural, the district court decided that plaintiff had been entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond. Accordingly, the court ordered defendants to deliver the statement and provide for the hearing, or, in the alternative, to offer a contract for the ensuing school year. By the time of the decision the upcoming school year was '70-'71. The district court stayed its order pending appeal, and the upcoming school year is now '71-'72.

The district court made it clear that the prescribed procedure was designed to safeguard a due process right that "the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," and that the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (p. 979.)

Defendants do not question the proposition, documented by the district court at page 976, that the "employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States." They would say that the proposition (which they deny) that reemployment was denied plaintiff because of his exercise of protected rights is for him to prove, if he is able, in the branch of this case which is not now before us.

The contest on this appeal is whether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible.

Defendants rely on the traditional principle "that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[1]/

Cafeteria Workers,[2]/ involved denial by government of an individual's access to a government facility, resulting in inability to continue private employment at that facility.

Cafeteria Workers v. McElroy (1961), 367 U.S. 886, 896, 6 LEd 2d 1230, citing *Vitarelli v. Seaton* (1959), 359 U.S. 535, 539, 3 LEd 2d 1012. Those decisions did not involve teachers, but the principle was assumed in *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 5 LEd 2d 231, involving state university as well as public school teachers, and has been followed in other decisions involving non-tenured teachers: *Jones v. Hoppe* (10th Cir., 1969), 410 F 2d 1323, 1329, cert. den. 397 U.S. 991; *Freeman v. Gould Special Sch. Dist. of Lincoln County, Ark.* (8th Cir. 1969), 405 F 2d 1153, 1159, cert. den. 396 U.S. 843; *Williams v. School District of Springfield R 12* (Mo., 1969), 447 SW 2d 256, 270; *Henry v. Coahoma County Board of Education* (N.D.Miss., 1963), 246 FSupp. 517, 521, aff'd 5th Cir. 353 F 2d 678, cert. den. 384 U.S. 962; *Hopkins v. Wasson* (E.D.Tenn., 1962), 227 FSupp. 278, aff'd. 6th Cir., 329 F 2d 67, cert. den. 379 U.S. 854.

Supra, fn. 1.

Although the Supreme Court suggested that the individual's interest in access to her job was closely analogous to the interest of a government employee in retaining his job, and in that connection stated the principle relied on by defendants, the Court also held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This was the balancing formula which the district court applied in the instant case, reaching a result different from the result in *Cafeteria Workers*.[2a]

The opinion in *Cafeteria Workers* itself suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. In *Goldberg v. Kelly*[3] the Supreme Court referred generally to relevant constitutional restraints applying to discharge from public employment, among other types of government action, and after stating that "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication," quoted the balancing language from *Cafeteria Workers*. The Supreme Court has held that one who applies for a license to practice a profession is entitled to procedural safeguards not required in *Cafeteria Workers* "where only 'the opportunity to work at one isolated and specific military installation' was involved."[4]. Several courts have found a due process right

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[2a] See *Kiiskila v. Nichols* (7th Cir., 1970), 433 F.2d 745.

(1970), 397 U.S. 254, 262.

[4] *Willner v. Committee on Character & Fitness* (1963), 373 U.S. 96, 103, footnote 2, 10 L.Ed.2d 224.

where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation.[5] We think the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

We note that the Supreme Court has denied certiorari in several cases where a court of appeals has declined to recognize similar due process rights of an elementary or secondary public school teacher who has been dismissed or not re-employed.[6] On the other hand, the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community.[7] "Moreover, in the case of teachers, the government's interest goes beyond the promotion of fairness to the encouragement of an academic atmosphere free from the threat of arbitrary treatment."[8]

Birnbaum v. Trussell (2d Cir., 1966), 371 F 2d 672, physician employed at municipal hospital; *Meredith v. Allen County War Memorial Hospital Com'n* (6th Cir., 1968), 397 F 2d 33, physician on staff of county hospital; *Lucia v. Duggan* (D.Mass., 1969), 303 FSupp. 112, public school teacher; *Orr v. Trinter* (S.D.Ohio, August 3, 1970), public school teacher. See also, the dissenting opinion of Judge Lay in *Freeman*, supra n. 1, pages 1161, 1164.

Jones, *Freeman*, *Henry*, and *Hopkins*, supra, fn. 1. The Court has, however, recently granted certiorari in a case in this field: *Sindermann v. Perry* (5th Cir., 1970), 430 F 2d 939, cert. granted June 14, 1971, 39 L.W. 3548.

Shelton v. Tucker (1960), 364 U.S. 479, 487, quoting from *Weiman v. Updegraff* (1952), 344 U.S. 183, 195, and *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 250.

Developments-Academic Freedom (1968), 81 Harvard Law Rev. 1045, 1082.

The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.[9]/

The judgment appealed from is affirmed.[10]/ Necessarily our affirmance does not deprive the district court of power to modify the judgment so as make adjustments for the passage of time or circumstances which have arisen since its entry.

See Van Alstyne, Right-Privilege Distinction (1968), 81 Harvard Law Rev. 1439, 1453.

Since this opinion adopts a position concerning which a conflict appears to exist between the circuits, the majority and dissenting opinions have been circulated, before filing, to all the judges of this court in regular active service. The proposition that the appeal be reheard en banc failed to receive the support of a majority, four voting in favor and four opposed.

DUFFY, *Senior Circuit Judge*, dissenting.

I respectfully dissent. I agree with the statement in one of the amicus curiae briefs submitted in this case that "Affirmance of the judgment below . . . will constitute an unprecedented and unwise incursion of the federal courts into the domain of public higher education."[1] In holding that under the Wisconsin statutory provision which permits the contracts of probationary instructors to expire at the "pleasure" of the university, it must now include a statement of reasons and the opportunity for a hearing, the majority calls into question a practice that is well established and is customary at more than one thousand public schools and universities in this country, which have some three hundred thousand faculty members and over six million students. (Amicus brief, at 2-3). I do not believe that the procedural protections now called for by the majority opinion are required by the Constitution or will they prove to be effective protections in fact.

Plaintiff, David Roth, never had been employed in the state university system before he signed a contract to teach at Wisconsin State University, Oshkosh, for the 1968-69 academic year. This was his first teaching job. The contract was for one year only and it is clear that under the Wisconsin Statutes (Wis. Stats. Sec. 37.31(1)) the contract carried with it no further express or implied promise of continued employment. Moreover, the statute did not provide for a statement of reasons or a hearing in the event that the contract of a probationary instructor such as Roth was not renewed for the following year. This is to be contrasted with the situtation of

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[1] Brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, The American Council on Education and the Association of American Colleges, p. 3.

a tenured faculty member who could only be dismissed "for cause", which includes, by definition, certain procedural protections such as the right to a statement of reasons and a hearing.

The tenure system in effect at Wisconsin State University-Oshkosh is typical of college tenure systems throughout the United States. In Wisconsin, the tenure system for colleges and universities is adopted by statute. (Wis. Stats. Sec. 37.31(1)). A decision not to grant tenure ordinarily is embodied in a notice of contract non-renewal.

Consistent with customary procedure at the University, the decision not to rehire plaintiff Roth was made by President Guiles alone. However, the President then had before him the recommendation of the Tenure Committee of the Department of Political Science, the Dean of the School of Letters and Science and the Vice President for Academic Affairs. All of these recommended that plaintiff not be re-employed.

The Board of Regents can reverse a decision of the President of the University. However, Roth did not appeal to the Board. Instead, he filed the complaint in the District Court under 42 U.S.C. § 1983 from which this appeal is taken. His stated reason for this course of action was that the Federal Court "is the only entity to be trusted for a fair hearing."[2]/

Roth's complaint alleged first, that he was entitled to a statement of reasons and a hearing on the question of his non-renewal, and secondly, that the reason his contract was not renewed stemmed from his choosing to exercise his rights guaranteed by the Constitution.

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[2] Roth deposition, page 27.

However, as indicated in the majority opinion, this second and "substantive" ground for relief was kept separate from the procedural argument now before us. The District Judge granted partial summary judgment in favor of plaintiff solely on the ground that, as a matter of procedural due process, the defendants must give plaintiff a written statement of the reasons on which they relied in deciding not to reemploy him, and to offer him a hearing within a specified time at which he could reply to the stated reasons, or, in the alternative, that defendants offer plaintiff a contract for the up-coming academic year.

I

It is my personal opinion that the decision of the District Court is both unwise and unworkable. What troubles me especially is that the result of the decision might well be to make the Federal Courts the final arbiters of all similar cases. The majority opinion calls for a hearing before a state administrative body at which time difficult questions of constitutional law might well be presented. Administrative bodies of this sort are not qualified to pass on such questions. A person who feels he has been unjustly refused a renewal of his teaching contract certainly will not be satisfied with the result of such a hearing, if it be adverse to him. He will, quite naturally, seek relief in the federal courts and, once having reached that forum, will feel free to ignore all the proceedings that have transpired before. Indeed, that appears to have been the attitude of the plaintiff in the case before us as indicated by his statement that the Federal Court was "the only entity to be trusted for a fair hearing."

On the other hand, the state will not be so free to ignore the results of such hearings but will, instead, be required to incur a great expense to provide them in the first place. In undertaking the balancing test of the "precise nature of the government function involved as well as of the private interest that has been affected by governmental action" called for in *Cafeteria Workers v. McElroy*, 367 U.S. 886 at 895, I do not think that either the District Judge or the majority here placed sufficient weight on the burden to be borne by the State in providing these hearings. We may note that as a result of very rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Moreover, it also has been pointed out to us that the seller's market in teaching talent has changed to a buyer's market, and that we may well expect that universities will take this opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful. The result, obviously, will be that a much greater number of non-tenured teachers will be notified that their contracts have not be[en] renewed than has been true in the past. As illustration of the fact that this trend already has begun we note, from appellant's brief, that for 1970 alone, 206 non-tenured teachers of the Wisconsin State University system were notified that they would not be retained. Clearly, it will be a significant burden for the State to hold hearings on the difficult questions involved in non-renewal decisions even if not all of those teachers demand that a hearing be held.

I further feel that the procedures ordered by the District Court and approved of by the majority here will be almost impossible to administer and certainly will not render any easier the task of federal courts in their assessment of whether or not any substantive constitutional freedoms have

been impinged. Decisions over whether or not to rehire a probationary instructor are exceedingly difficult to make, are based on various combinations of personal judgments, and are no easier to review. Under the majority's holding, administrative bodies will be compelled to review these personal judgments while possessing no expertise in the ultimate constitutional claims at issue. We shall then be called upon to conduct a second review of a, no doubt, already confusing set of facts. Our task may end up being both unmanagable and futile.

The majority opinion states that the hearing is called for in part as a "prophylactic" against infringement of constitutional freedoms, yet it is difficult to see how such proceedings will assist the process in any appreciable manner. If, in fact, certain educational bodies may sometimes act out of ill will in rendering non-renewal decisions (a proposition which I do not so readily accept), they clearly will not be deterred by any procedures approved of by this Court.

The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result.

On the difficulty in assessing tenuring decisions see F. Machlup, "On Some Misconceptions Concerning Academic Freedom," in *Academic Freedom and Tenure*, at pp. 185-6. On the problems of judicial review of school discipline generally see Judge Law's dissent in *Esteban v. Central Missouri State College*, 415 F. 2d 1077, 8 Cir. 1969).

II

Aside from my own personal views on the matter, I wish to point out that the majority opinion goes far beyond the present state of the law and, in fact, now places this Circuit in direct conflict with two other Circuits in this area of the law. Of course, I recognize that a university may not, consistent with the Constitution, take retaliatory action against one of its employees just because that employee has chosen to exercise his rights guaranteed to him by the Constitution. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *McLaughlin v. Tilendis*, 398 F. 2d 287 (7 Cir., 1969). But that is not what is involved here. We deal instead with what procedures must be followed by a university when indicating to a probationary instructor that he will not be rehired for the following year.

Procedural due process is a totally separate area from the protection of substantive constitutional rights and, as the Supreme Court has indicated—"The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest." *Cafeteria Workers v. McElroy*, *supra*, at 895. But even acknowledging that the flexible standard of procedural due process may sometimes require the affording of a hearing and other minimal protections when life and liberty are at stake, *Goldberg v. Kelly*, 397 U.S. 254, *Hahn v. Burke*, 430 F. 2d 100 (7 Cir., 1970), cert. den. 39 Law Week, 3473 (April 21, 1971), that does not mean that the majority's result is required. For, as I read the majority opinion, it now becomes the first opinion to require that these procedures be mandated to a probationary instructor whose contract is not renewed yet, who admittedly has made no further substantive allegation of infringement of constitutional freedoms.

It is clear that nothing in any of the Supreme Court decisions compels the majority's result here. If anything, the Court has assumed the constitutionality of the tenure process, and its corollary, the dismissal of non-tenured faculty members without notice, hearing or statement of reasons even as the Court, at the same time, has been vigilant to protect substantive constitutional freedoms. This was exactly the case in *Shelton, supra*, where the Court struck down an Arkansas statute which impinged on teachers' freedom of association. Yet, in so doing, the Court noted by contrast that "such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." (P. 486). While the infringement on the freedom of association was condemned, the validity of the very procedures before us now was assumed.

The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones v. Hopper*, 410 F. 2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman v. Gould Special School District*, 405 F. 2d 1153 (8 Cir., 1969), cert. den. 396 U.S. 843 (Justice then Judge Blackmun, a concurring member of the panel). In response to the same procedural due process argument as advanced here, the Freeman Court stated: "if this were so [if the argument were accepted] we would have little need of tenure or merit laws as there could only be, as argued by the

plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason." (at p. 1160). Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits.

I wish to emphasize that the majority opinion now requires that universities comply with the procedures established by the District Court order, even when there is absolutely no indication of any infringement of the constitutional rights of the teacher in question. In so doing, the majority opinion becomes unique unto itself. I realize that there have been those decisions which have called for a hearing or similar procedures in school cases, but these have arisen only when there has been an allegation of serious infringement of other constitutional rights. *Ferguson v. Thomas*, 430 F. 2d 852 (5 Cir., 1970); *Lucas v. Chapman*, 430 F. 2d 945 (5 Cir., 1970); *Hopkins v. Wasson*, 227 F. Supp. 278, affd. 329 F. 2d 67 (6 Cir., 1964), cf. *Meredith v. Allen County War Mem. Hosp. Comm'n.*, 397 F. 2d 33 (6 Cir., 1968). In each of those decisions, the allegation of an infringement of substantive constitutional rights was recognized as critical by the Court before a hearing would be held to be required. Indeed, the *Lucas* Court took pains to point out its holding "should not be misunderstood", that the hearing was required only when "the asserted reason for termination involved a possible collision with . . . First Amendment rights." (at p. 947). As mentioned before, I have grave doubts as to the practical workability of such a distinction, but even conceding that, it should be noted that the majority now goes beyond those cases to hold that a university must "shoulder the burden" in *all* cases, even in those situations where there is no allegation of infringement of First Amendment rights.

That such is the majority's holding is indicated at the outset of its opinion, further, in the statement on page 5 that the holding "applies by its terms to all non-retention decisions", and from an examination of the proceedings in the District Court. (310 F. Supp. at 982-3). If plaintiff Roth did have a *bona fide* claim of infringement of his First Amendment rights, he deliberately has held that claim in abeyance in another "branch" of the case in order to establish, as a matter of law, the requirement of the procedural protections before us now. I think that this Court's acceptance of that format for argument has resulted in the unnecessary decision of a constitutional question which has been doubly unfortunate in that it has resulted in this Circuit going far beyond any other case in this area. It is puzzling that the Court has been willing to do this for in one of the very cases cited as support by the majority, we indicated our preference to decide only those constitutional issues necessary to resolve the controversy. In *Kiiskila v. Nichols*, 433 F. 2d 745, en banc (1970), this Court held that a civilian employee had been improperly excluded from a military reservation because of her expression of anti-war views. In that case, the requirement that a hearing be given was urged upon this Court. Even though the Court expressed some doubt as to whether the employee could be so excluded without the opportunity for a hearing (p. 747, n. 2) we deliberately stated that we "need not decide" that question because the case could be resolved otherwise. I think that such a practice should have been followed by the District Judge in the case at bar with, perhaps, the consequence that such a wide reaching and unsettling result would not have been reached.

In my view, the State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff

David Roth might have had in continued employment at Wisconsin State University.[1] I believe that the teaching of *Cafeteria Workers v. McElroy, supra,* supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state educational systems. It is one thing to recognize that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton*, at page 487); and that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines County School Dist.*, 393 U.S. 503 (1969) but it is quite another to hold that anxiety over hypothetical infringements of unknown constitutional freedoms demands that states accord the full panoply of procedural due process guarantees for those teachers whose services they designate as no longer required.

We should follow the decision in *Freeman v. Gould Special School District, supra,* where the Court held that "Probationary instructors whose contracts were not renewed, were not entitled to a hearing with notice."

I respectfully dissent.

(Certification Omitted)

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[1] It is interesting to note that Roth signed his one year teaching contract presumably with full knowledge of the Wisconsin Statute (Wis. Stat. Ann. Sec. 37.31) which does not provide for a hearing or statement of reasons in the event that his contract was not renewed. On the other hand, in *Birnbaum v. Trussel*, 371 F. 2d 672, relied upon heavily by the majority, it appears that there was some pre-existing state requirement that a hearing be provided for physicians who were to be discharged. While this factor by itself cannot, of course, be determinative, due to the Supremacy Clause, it is clear that Roth's "expectancy" in continued employment and in the procedures to be followed in terminating that employment differed sharply from that of Dr. Birnbaum. On other distinctions between the expectancies of teachers as opposed to physicians, see *Freeman, supra*, at 1160.

Supreme Court of the United States

No. 71-162 ~~, October Term, 19-~~

The Board of Regents of State Colleges et al.,

Petitioners,

v.

David F. Roth, etc.

ORDER ALLOWING CERTIORARI. Filed. October 26 ---------- , 19 71.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted.

FILE COPY

FILED
AUG 3 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, The Board of Regents of State Colleges, and Roger E. Guiles respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 1, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix. The opinion of the District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 and is printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1971, and on July 14, 1971, that Court granted a stay of mandate in accordance with Rule 41 (b) of the Federal Rules of Appellate Procedure. This petition for certiorari was filed within the period of the 30 day stay of mandate. This Court's jurisdiction is involved under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a probationary instructor at a state university, who is employed on an academic year to year basis prior to the acquiring of tenure under state law, has the right under the Fourteenth Amendment due process clause to a written statement of reasons as to why he is not going to be given a contract of employment for the ensuing academic year and an administrative hearing on those reasons?

STATUTES INVOLVED

Wisconsin Statutes 1967, 37.11, 37.11 (3) and 37.31 (1)

37.11 Powers of board as to state colleges. The said board shall have the government and control of all the state colleges, and may:

(3) Remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31.

37.31 Teachers employed on probation; tenure; compulsory retirement. (1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. An official leave of absence shall not constitute a break in continuous service, nor shall it count toward the 4 years required to attain tenure. No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision. The action and decision of the board in the matter shall be final. The term "teachers" as used in this section includes all persons engaged in teaching as their principal occupation but shall not include any university president or acting president in his capacity as president of any of the state universities.[1]

---

[1] The Legislature has since increased the probationary period to six years Ch. 233, Laws of 1969, effective November 26, 1969.

STATEMENT OF THE CASE

Petitioner, Board of Regents of State Universities, is a public board established by Chapter 37 of the Wisconsin Statutes and entrusted with the government and control of the nine Wisconsin State Universities. Petitioner, Roger E. Guiles, is the president of the State University at Oshkosh.[2]

David F. Roth, respondent, hereinafter referred to by name, was employed by the Board of Regents of State Universities on June 12, 1968, as an assistant professor at the Wisconsin State University-Oshkosh for one academic year commencing September 1, 1968 and ending June 30, 1969. He had never before been employed in the State University system.

Dr. Roth's contract of employment provided that "the employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." (In this case June 30, 1969).

Roth was employed under the provisions of sec. 37.11, Wis. Stats., which authorized the Board of Regents:

> "(3) To remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31."

His employment was also governed by sec. 37.31, Stats. The pertinent part was as follows:

---

[2] Until recently the Board was known as Board of Regents of State Colleges and the State Universities were known as State Colleges.

> "(1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. * * * No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. * * *"

Pursuant to the notice requirements of the Board of Regents, Dr. Roth was advised of President Guiles' decision not to employ him for the following academic year by letter dated January 30, 1969.

The letter gave no reasons which was consistent with Rule II of the Board of Regents which provided:

> "During the time a faculty member is on probation, no reason for nonretention need be given."[3]

On February 14, 1969, Dr. Roth commenced an action in the District Court for the Western District of Wisconsin under 42 U.S.C. § 1983, asserting that the decision not to employ him for another year and the failure to give him a statement of reasons for not reemploying him and a hearing thereon, violated his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Dr. Roth moved for "partial" summary judgment and on March 12, 1970, the District Court entered its Memorandum Opinion and Order, which ordered and adjudged that by March 20 the petitioners give Roth a written statement of reasons on which they had relied in deciding not to offer him a contract for the next academic year; that they schedule a hearing before June 30, 1970, at which he might respond to the stated

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[3] Dr. Roth was not discharged but completed the academic year 1968-1969. Nonretention refers to nonrenewal of a contract and not discharge.

reasons; and then that within 15 days after the hearing they notify his counsel either that he will or will not be offered a contract for the coming academic year; or in the alternative to such notice and hearing that petitioners offer Roth a contract as a member of the faculty for the academic year 1970-1971, on as favorable terms as his previous contract.

In the memorandum opinion accompanying the order and judgment, the District Judge went beyond the particular case, and held broadly and apparently with respect to all probationary university professors, as follows:

> "* * *I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor."

Petitioners filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit on April 10, 1970, and moved for a stay of the Court's order pending the appeal. An order granting the stay was entered.

The Court of Appeals affirmed the judgment on July 1, 1971,[1] holding in part:

> "* * * Necessarily our affirmance does not deprive the district court of power to modify the judgment so as to make adjustments for the passage of time or circumstances which have arisen since its entry." (See page 206 of appendix hereto.)

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[1] Hon. F. Ryan Duffy, Senior Circuit Judge, dissenting. See pages 206-216 of appendix hereto.

Petitioners' motion to the Court of Appeals for a stay of mandate pending this application was granted on July 14, 1971. See page 239 of appendix hereto.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court.

The decision below notes from *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, that the case:

> "* * * suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. * * *"

However, this Court held in *Cafeteria Workers v. McElroy*, supra, on pages 896-897:

> "* * *It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. (citing cases) This principle was reaffirmed quite recently in *Vitarelli v. Seaton*, 359 U.S. 535, 79 S, Ct. 968, L. Ed. 2d 1012. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 USCA § 632 et seq., 'could have been summarily discharged by the Secretary at any time without the giving of a reason * * *' 359 U.S., at 539, 79 S. Ct. at p. 972."

And the Honorable F. Ryan Duffy, Senior Circuit Judge, in his dissenting opinion below states:

> "In my view, the State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff David Roth might have had in continued employment at Wisconsin State University. I believe that the

teaching of *Cafeteria Workers v. McElroy*, *supra*, supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state education systems. * * *"

II. There Is A Conflict Among The Courts Of Appeal.

Judge Duffy's dissenting opinion below states:

"The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones v. Hopper*, 410 F.2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8 Cir., 1969) cert. den. 396 U.S. 843 * * * Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits."

Nor is the *Roth* decision in harmony with the Fifth Circuit where the rule has been established in *Thau v. Board of Public Instruction of Dade Co., Fla.* (1970), 432 F.2d 98, *Pred v. Board of Public Instruction* (1969), 415 F. 2d 851 and *Sindermann v. Perry* (1970), 430 F.2d 939, cert. granted June 14, 1971, 39 L.W. 3548, that a hearing need only be given in those instances where the teacher has acquired a right of expectancy or tenure or the claim is made that nonretention is grounded upon the exercise of First Amendment

rights. Also see *Ferguson v. Thomas*, 430 F.2d 852 (5 Cir., 1970); *Lucas v. Chapman*, 430 F.2d 945 (5 Cir., 1970); *Hopkins v. Wasson*, 221 F. Supp. 278, aff'd. 329 F.2d 67 (6 Cir., 1964). To the contrary, the *Roth* decision requires a hearing, when requested, in all cases involving the nonretention of a probationary teacher.

The *Roth* decision is not in complete harmony with the First Circuit where the Court held in *Drown v. Portsmouth School District* (1970), 435 F. 2d 1182, that a probationary teacher is entitled to a statement of reasons for nonrenewal but expressly rejected the holding below regarding an administrative hearing and held that the teacher was not entitled to a hearing on the reasons for nonretention.

III. The Decision In Roth Raises Significant Problems And Results In Sweeping Changes In The Administration Of Public Education Without Practical Benefit.

The practice of the petitioners in not giving a written statement setting forth the reasons for nonretention and hearing thereon is the "* * * customary practice at approximately 1080 public colleges and universities in the United States, with almost 300,000 faculty members * * *"/5.

The giving of reasons and a hearing in every case of the nonrenewal of a probationary teacher was rejected in *Sindermann v. Perry* (1970), 430 F.2d 939, 944 as interfering with

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/5 Statement from brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, the American Council on Education and the Association of American Colleges as Amici Curiae.

freedom of contract to employ probationary teachers and was found that it would result in tenure by Court edict. Similarly, the District Court in the *Roth* decision noted the danger that any distinction between tenure and absence of tenure will shrink and disappear but balanced that result as against the interest of the probationary teacher and found it to be less persuasive (P. 228 appendix hereto). However, in balancing the interests of the state as against the interests of the teacher, the District Court did so in the absence of a record and apparently relied on judicial notice to arrive at a factual conclusion that petitioners assert is erroneous.

The dissenting opinion of Judge Duffy noted:

> "The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result." (P. 211 appendix hereto)

Academic freedom as well as academic excellence will surely suffer by the impairment of tenure.

Requiring hearings in all cases of the nonrenewal of probationary teachers will result in, as noted in *Drown v. Portsmouth School District* (1970), 435 F.2d 1182, 1185-1186, a reluctance on the part of school administrators to recommend nonretention in an attempt to avoid time consuming, expensive and possibly embarrassing hearings. The end result

will be administrative tolerance for the incompetent. Further, school administrators will exercise over-caution in hiring new teachers resulting in "a teaching force of homogenized mediocrities."

Most significant is the fact that such hearing will be purely illusory. The decision to retain or not retain a probationary teacher is an administrative decision not judicial. It cannot be made judicial or subject to judicial process for there is:

> "* * * available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues." (Decision of the District Court below, p. 227 appendix hereto)

Nor can a teacher's competence be resolved by judicial process when:

> "A professor's value depends upon his creativity, his rapport with students and colleagues and various other intangible qualities which cannot be measured by objective standards." *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

Similarly, if nonretention is based on budgetary consideration, changes in curriculum or the institution's desire to foster academic excellence such administrative determinations of the school are not the proper subject for an administrative or judicial hearing.

If the hearing is to deal with constitutional issues it is likely to present difficult questions of law and fact, which are ill suited to resolution at a hearing before a university president or his delegate, or a board of regents. The issues involved in these free speech cases are more properly matters for determination in Court; and Congress has given the

teacher a forum in the Federal Court to voice any legitimate grievance. (*Drown v. Portsmouth School District*, supra, pp. 1186-1187; Dissenting Opinion below, p. 209 appendix hereto.)

The requirement that reasons and hearing be offered in all cases of nonretention will be burdensome on the universities, colleges and schools affected by it. As the result of several years of extremely rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Thus in the faculty at Oshkosh there were 442 nontenured teachers in the academic year 1968-1969 out of a total faculty of about 634 — and the proportion is somewhat the same at the other eight State Universities. The leveling-out of enrollments is sure to result in many more nonretentions in 1970 and the following years. While their number does not appear in the record here, we were informed by the State Universities system that in the academic year just ended 206 nontenured teachers were notified that they would not be retained. It is common knowledge that the seller's market in teaching talent has changed to a buyer's market, as enrollments and budgets have leveled off and Ph.Ds are in abundant supply, and the universities and colleges may be expected to take the opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful.

Nor will the probationary teacher be necessarily benefited by a compulsory statement of reasons and hearing. Such procedure will be likely in many cases to be harmful rather than helpful to the teacher's future career; for the statement will doubtless be drawn, as well as presented, to make the best case possible for nonretention, and may spread upon the teacher's record shortcomings which he would perfer to have forgotten.

The decision below will impose a very substantial burden on the universities and others similarly situated, to draft statements of reasons and hold hearings. The clear effect of which is to have the selection of the faculty subject to judicial review. Nor is the effect of this ruling limited to academic employment. Logically, the decision would apply to all state employment as well as to all local governmental employment.

It appears to the petitioners that this decision is not only in direct conflict with two Circuits but far exceeds in scope and impact the decisions of those Circuits which have had the occasion to consider the question./[6]

This Court in granting certiorari in *Sindermann v. Perry*, supra, recognized the importance of the issues in that case. The facts of that case differ from the facts in the *Roth* case in that it appeared Mr. Sindermann could never have acquired tenure. To the contrary, in *Roth* a state statute granted tenure after a statutory probationary period. During a probationary period there clearly can be no "expectancy of reemployment," a point specifically noted and accepted by the Court in *Sindermann v. Perry*, supra, p. 944, but rejected in *Roth*. Further, it is clear under *Roth*, the school must always assign a cause for the nonrenewal of a probationary teacher's contract when requested; a view rejected by the Court in *Sindermann*, supra, p. 944. Finally, under *Roth* a hearing on nonrenewal must be given whenever requested by the probationary teacher but in *Sindermann* a hearing need only be given in those situations involving tenure, right of expectancy or where the teacher claims violation of

/[6]We have just been advised that the Sixth Circuit on June 16, 1971, in case No. 20721 reversed the decision in *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio E.D. 1970) and places the Seventh Circuit in direct conflict with the Sixth Circuit.

constitutional rights or other actionable wrong. The *Roth* decision far exceeds the issues raised in *Sindermann*. The decision of the Seventh Circuit leaves governmental employment within the Circuit subject to drastic change, if not reversed.

It is respectfully submitted that certiorari be granted.

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Attorneys for Petitioners



September Term, 1970 — September Session, 1970

No. 18490

DAVID E. ROTH, for himself and for all others similarly situated,
Plaintiff-Appellee,
v.
THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

JULY 1, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* In this case (involving an official decision at a state university not to reemploy a non-tenured professor) the parties each made motions for summary judgment. The district court decision is reported at 310 FSupp. 972. Defendants' motion was denied, and plaintiff's motion was granted in part. The order appears on pages 983 and 984. Defendants have appealed from the judgment accordingly entered. Although such judgment did not finally dispose of all issues, and no direction was made under Rule 54(b) F.R.C.P., it amounted to an injunction, and was appealable as such under 28 U.S.C. §1292(a) (1).

The facts, the disposition of the motions, and the reasoning employed are well stated in the opinion of the district court, and we shall avoid unnecessary repetition. It suffices, now, to say that during the school year '68-'69, plaintiff was a non-tenured professor at a state university who claimed (1) that the reason for defendants' decision not to retain him for the school year '69-'70 was to retaliate for plaintiff's constitutionally protected expression of opinion and (2) that even as a non-tenured member of the faculty he was constitutionally entitled either to be retained or to be given a hearing on the merits of the decision not to retain him.

With respect to issue (1), which may be termed substantive, the district court decided there were issues of fact. Such issues have not been determined and the respective claims concerning them are before us only as background. With respect to issue (2), which may be called procedural, the district court decided that plaintiff had been entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond. Accordingly, the court ordered defendants to deliver the statement and provide for the hearing, or, in the alternative, to offer a contract for the ensuing school year. By the time of the decision the upcoming school year was '70-'71. The district court stayed its order pending appeal, and the upcoming school year is now '71-'72.

The district court made it clear that the prescribed procedure was designed to safeguard a due process right that "the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," and that the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (p. 979.)

Defendants do not question the proposition, documented by the district court at page 976, that the "employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States." They would say that the proposition (which they deny) that reemployment was denied plaintiff because of his exercise of protected rights is for him to prove, if he is able, in the branch of this case which is not now before us.

The contest on this appeal is whether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible.

Defendants rely on the traditional principle "that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[1/]

Cafeteria Workers,[2/] involved denial by government of an individual's access to a government facility, resulting in inability to continue private employment at that facility.

1/ *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 896, 6 LEd 2d 1230, citing *Vitarelli v. Seaton* (1959), 359 U.S. 535, 539, 3 LEd 2d 1012. Those decisions did not involve teachers, but the principle was assumed in *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 5 LEd 2d 231, involving state university as well as public school teachers, and has been followed in other decisions involving non-tenured teachers: *Jones v. Hopper* (10th Cir., 1969), 410 F 2d 1323, 1329, cert. den. 397 U.S. 991; *Freeman v. Gould Special Sch. Dist. of Lincoln County, Ark.* (8th Cir. 1969), 405 F 2d 1153, 1159, cert. den. 396 U.S. 843; *Williams v. School District of Springfield R-12* (Mo., 1969), 447 SW 2d 256, 270; *Henry v. Coahoma County Board of Education* (N.D.Miss., 1963), 246 FSupp. 517, 521, aff'd 5th Cir. 353 F 2d 648, cert. den. 384 U.S. 962; *Hopkins v. Wasson* (E.D.Tenn., 1962), 227 FSupp. 278, aff'd, 6th Cir., 329 F 2d 67, cert. den. 379 U.S. 854.

2/ Supra, fn. 1.

Although the Supreme Court suggested that the individual's interest in access to her job was closely analogous to the interest of a government employee in retaining his job, and in that connection stated the principle relied on by defendants, the Court also held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This was the balancing formula which the district court applied in the instant case, reaching a result different from the result in *Cafeteria Workers.*[2a]/

The opinion in *Cafeteria Workers* itself suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. In *Goldberg v. Kelly*[3]/ the Supreme Court referred generally to relevant constitutional restraints applying to discharge from public employment, among other types of government action, and after stating that "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication," quoted the balancing language from *Cafeteria Workers.* The Supreme Court has held that one who applies for a license to practice a profession is entitled to procedural safeguards not required in *Cafeteria Workers* "where only 'the opportunity to work at one isolated and specific military installation' was involved."[4]/ Several courts have found a due process right

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[2a]/ See *Kiiskila v. Nichols* (7th Cir., 1970), 433 F 2d 745.
[3]/ (1970), 397 U.S. 254, 262.
[4]/ *Willner v. Committee on Character & Fitness* (1963), 373 U.S. 96, 103, footnote 2, 10 LEd 2d 224.

where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation.[5]/ We think the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

We note that the Supreme Court has denied certiorari in several cases where a court of appeals has declined to recognize similar due process rights of an elementary or secondary public school teacher who has been dismissed or not re-employed.[6]/ On the other hand, the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community.[7]/ "Moreover, in the case of teachers, the government's interest goes beyond the promotion of fairness to the encouragement of an academic atmosphere free from the threat of arbitrary treatment."[8]/

5/ *Birnbaum v. Trussell* (2d Cir., 1966), 371 F 2d 672, physician employed at municipal hospital; *Meredith v. Allen County War Memorial Hospital Com'n* (6th Cir., 1968), 397 F 2d 33, physician on staff of county hospital; *Lucia v. Duggan* (D.Mass., 1969), 303 FSupp. 112, public school teacher; *Orr v. Trinter* (S.D.Ohio, August 3, 1970), public school teacher. See also, the dissenting opinion of Judge Lay in *Freeman*, supra n. 1, pages 1161, 1164.

6/ *Jones, Freeman, Henry,* and *Hopkins,* supra, fn. 1. The Court has, however, recently granted certiorari in a case in this field: *Sindermann v. Perry* (5th Cir., 1970), 430 F 2d 939, cert. granted June 14, 1971, 39 L.W. 3548.

7/ *Shelton v. Tucker* (1960), 364 U.S. 479, 487, quoting from *Weiman v. Updegraff* (1952), 344 U.S. 183, and *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 250.

8/ Developments-Academic Freedom (1968), 81 Harvard Law Rev. 1045, 1082.

The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.[9]/

The judgment appealed from is affirmed.[10]/ Necessarily our affirmance does not deprive the district court of power to modify the judgment so as make adjustments for the passage of time or circumstances which have arisen since its entry.

9/ See Van Alstyne, Right-Privilege Distinction (1968), 81 Harvard Law Rev. 1439, 1453.

10/ Since this opinion adopts a position concerning which a conflict appears to exist between the circuits, the majority and dissenting opinions have been circulated, before filing, to all the judges of this court in regular active service. The proposition that the appeal be reheard en banc failed to receive the support of a majority, four voting in favor and four opposed.

DUFFY, *Senior Circuit Judge,* dissenting.

I respectfully dissent. I agree with the statement in one of the amicus curiae briefs submitted in this case that "Affirmance of the judgment below . . . will constitute an unprecedented and unwise incursion of the federal courts into the domain of public higher education."[1]/ In holding that under the Wisconsin statutory provision which permits the contracts of probationary instructors to expire at the "pleasure" of the university, it must now include a statement of reasons and the opportunity for a hearing, the majority calls into question a practice that is well established and is customary at more than one thousand public schools and universities in this country, which have some three hundred thousand faculty members and over six million students. (Amicus brief, at 2-3). I do not believe that the procedural protections now called for by the majority opinion are required by the Constitution or will they prove to be effective protections in fact.

Plaintiff, David Roth, never had been employed in the state university system before he signed a contract to teach at Wisconsin State University, Oshkosh, for the 1968-69 academic year. This was his first teaching job. The contract was for one year only and it is clear that under the Wisconsin Statutes (Wis. Stats. Sec. 37.31(1)) the contract carried with it no further express or implied promise of continued employment. Moreover, the statute did not provide for a statement of reasons or a hearing in the event that the contract of a probationary instructor such as Roth was not renewed for the following year. This is to be contrasted with the situtation of

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1/ Brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, The American Council on Education and the Association of American Colleges, p. 3.

a tenured faculty member who could only be dismissed "for cause", which includes, by definition, certain procedural protections such as the right to a statement of reasons and a hearing.

The tenure system in effect at Wisconsin State University-Oshkosh is typical of college tenure systems throughout the United States. In Wisconsin, the tenure system for colleges and universities is adopted by statute. (Wis. Stats. Sec. 37.31(1)). A decision not to grant tenure ordinarily is embodied in a notice of contract non-renewal.

Consistent with customary procedure at the University, the decision not to rehire plaintiff Roth was made by President Guiles alone. However, the President then had before him the recommendation of the Tenure Committee of the Department of Political Science, the Dean of the School of Letters and Science and the Vice President for Academic Affairs. All of these recommended that plaintiff not be re-employed.

The Board of Regents can reverse a decision of the President of the University. However, Roth did not appeal to the Board. Instead, he filed the complaint in the District Court under 42 U.S.C. § 1983 from which this appeal is taken. His stated reason for this course of action was that the Federal Court "is the only entity to be trusted for a fair hearing."[2/]

Roth's complaint alleged first, that he was entitled to a statement of reasons and a hearing on the question of his non-renewal, and secondly, that the reason his contract was not renewed stemmed from his choosing to exercise his rights guaranteed by the Constitution.

2/ Roth deposition, page 27.

However, as indicated in the majority opinion, this second and "substantive" ground for relief was kept separate from the procedural argument now before us. The District Judge granted partial summary judgment in favor of plaintiff solely on the ground that, as a matter of procedural due process, the defendants must give plaintiff a written statement of the reasons on which they relied in deciding not to reemploy him, and to offer him a hearing within a specified time at which he could reply to the stated reasons, or, in the alternative, that defendants offer plaintiff a contract for the up-coming academic year.

I

It is my personal opinion that the decision of the District Court is both unwise and unworkable. What troubles me especially is that the result of the decision might well be to make the Federal Courts the final arbiters of all similar cases. The majority opinion calls for a hearing before a state administrative body at which time difficult questions of constitutional law might well be presented. Administrative bodies of this sort are not qualified to pass on such questions. A person who feels he has been unjustly refused a renewal of his teaching contract certainly will not be satisfied with the result of such a hearing, if it be adverse to him. He will, quite naturally, seek relief in the federal courts and, once having reached that forum, will feel free to ignore all the proceedings that have transpired before. Indeed, that appears to have been the attitude of the plaintiff in the case before us as indicated by his statement that the Federal Court was "the only entity to be trusted for a fair hearing."

On the other hand, the state will not be so free to ignore the results of such hearings but will, instead, be required to incur a great expense to provide them in the first place. In undertaking the balancing test of the "precise nature of the government function involved as well as of the private interest that has been affected by governmental action" called for in *Cafeteria Workers v. McElroy*, 367 U.S. 886 at 895, I do not think that either the District Judge or the majority here placed sufficient weight on the burden to be borne by the State in providing these hearings. We may note that as a result of very rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Moreover, it also has been pointed out to us that the seller's market in teaching talent has changed to a buyer's market, and that we may well expect that universities will take this opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful. The result, obviously, will be that a much greater number of non-tenured teachers will be notified that their contracts have not be renewed than has been true in the past. As illustration of the fact that this trend already has begun we note, from appellant's brief, that for 1970 alone, 206 non-tenured teachers of the Wisconsin State University system were notified that they would not be retained. Clearly, it will be a significant burden for the State to hold hearings on the difficult questions involved in non-renewal decisions even if not all of those teachers demand that a hearing be held.

I further feel that the procedures ordered by the District Court and approved of by the majority here will be almost impossible to administer and certainly will not render any easier the task of federal courts in their assessment of whether or not any substantive constitutional freedoms have

been impinged. Decisions over whether or not to rehire a probationary instructor are exceedingly difficult to make, are based on various combinations of personal judgments, and are no easier to review. Under the majority's holding, administrative bodies will be compelled to review these personal judgments while possessing no expertize in the ulitmate constitutional claims at issue. We shall then be called upon to conduct a second review of a, no doubt, already confusing set of facts. Our task may end up being both unmanagable and futile.[3]/

The majority opinion states that the hearing is called for in part as a "prophylactic" against infringement of constitutional freedoms, yet it is difficult to see how such proceedings will assist the process in any appreciable manner. If, in fact, certain educational bodies may sometimes act out of ill will in rendering non-renewal decisions (a proposition which I do not so readily accept), they clearly will not be deterred by any procedures approved of by this Court.

The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result.

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[3]/ On the difficulty in assessing rehiring decisions see: F. Machlup "On Some Misconceptions Concerning Academic Freedom" in *Academic Freedom and Tenure*, at pp. 185-6. On the problems of judicial review of school cases in general see Judge Lay's dissent in *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8 Cir., 1969).

II

Aside from my own personal views on the matter, I wish to point out that the majority opinion goes far beyond the present state of the law and, in fact, now places this Circuit in direct conflict with two other Circuits in this area of the law. Of course, I recognize that a university may not, consistent with the Constitution, take retaliatory action against one of its employees just because that employee has chosen to exercise his rights guaranteed to him by the Constitution. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *McLaughlin v. Tilendis*, 398 F. 2d 287 (7 Cir., 1969). But that is not what is involved here. We deal instead with what procedures must be followed by a university when indicating to a probationary instructor that he will not be rehired for the following year.

Procedural due process is a totally separate area from the protection of substantive constitutional rights and, as the Supreme Court has indicated—"The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest." *Cafeteria Workers v. McElroy, supra*, at 895. But even acknowledging that the flexible standard of procedural due process may sometimes require the affording of a hearing and other minimal protections when life and liberty are at stake, *Goldberg v. Kelly*, 397 U.S. 254, *Hahn v. Burke*, 430 F. 2d 100 (7 Cir., 1970), cert. den. 39 Law Week, 3473 (April 21, 1971), that does not mean that the majority's result is required. For, as I read the majority opinion, it now becomes the first opinion to require that these procedures be mandated to a probationary instructor whose contract is not renewed yet, who admittedly, has made no further substantive allegation of infringement of constitutional freedoms.

It is clear that nothing in any of the Supreme Court decisions compels the majority's result here. If anything, the Court has assumed the constitutionality of the tenure process, and its corollary, the dismissal of non-tenured faculty members without notice, hearing or statement of reasons even as the Court, at the same time, has been vigilant to protect substantive constitutional freedoms. This was exactly the case in *Shelton, supra,* where the Court struck down an Arkansas statute which impinged on teachers' freedom of association. Yet, in so doing, the Court noted by contrast that "such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." (P. 486). While the infringement on the freedom of association was condemned, the validity of the very procedures before us now was assumed.

The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones v. Hopper,* 410 F. 2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman v. Gould Special School District,* 405 F. 2d 1153 (8 Cir., 1969), cert. den. 396 U.S. 843 (Justice, then Judge Blackmun, a concurring member of the panel). In response to the same procedural due process argument as advanced here, the Freeman Court stated: "if this were so [if the argument were accepted] we would have little need of tenure or merit laws as there could only be, as argued by the

plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason." (at p. 1160). Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits.

I wish to emphasize that the majority opinion now requires that universities comply with the procedures established by the District Court order, even when there is absolutely no indication of any infringement of the constitutional rights of the teacher in question. In so doing, the majority opinion becomes unique unto itself. I realize that there have been those decisions which have called for a hearing or similar procedures in school cases, but these have arisen only when there has been an allegation of serious infringement of other constitutional rights. *Ferguson v. Thomas*, 430 F. 2d 852 (5 Cir., 1970); *Lucas v. Chapman*, 430 F. 2d 945 (5 Cir., 1970); *Hopkins v. Wasson*, 227 F. Supp. 278, affd. 329 F. 2d 67 (6 Cir., 1964), cf. *Meredith v. Allen County War Mem. Hosp. Comm'n.*, 397 F. 2d 33 (6 Cir., 1968). In each of those decisions, the allegation of an infringement of substantive constitutional rights was recognized as critical by the Court before a hearing would be held to be required. Indeed, the *Lucas* Court took pains to point out its holding "should not be misunderstood", that the hearing was required only when "the asserted reason for termination involved a possible collision with . . . First Amendment rights." (at p. 947). As mentioned before, I have grave doubts as to the practical workability of such a distinction, but even conceding that, it should be noted that the majority now goes beyond those cases to hold that a university must "shoulder the burden" in *all* cases, even in those situations where there is no allegation of infringement of First Amendment rights.

That such is the majority's holding is indicated at the outset of its opinion, further, in the statement on page 5 that the holding "applies by its terms to all non-retention decisions", and from an examination of the proceedings in the District Court. (310 F. Supp. at 982-3). If plaintiff Roth did have a *bona fide* claim of infringement of his First Amendment rights, he deliberately has held that claim in abeyance in another "branch" of the case in order to establish, as a matter of law, the requirement of the procedural protections before us now. I think that this Court's acceptance of that format for argument has resulted in the unnecessary decision of a constitutional question which has been doubly unfortunate in that it has resulted in this Circuit going far beyond any other case in this area. It is puzzling that the Court has been willing to do this for in one of the very cases cited as support by the majority, we indicated our preference to decide only those constitutional issues necessary to resolve the controversy. In *Kiiskila v. Nichols,* 433 F. 2d 745, en banc (1970), this Court held that a civilian employee had been improperly excluded from a military reservation because of her expression of anti-war views. In that case, the requirement that a hearing be given was urged upon this Court. Even though the Court expressed some doubt as to whether the employee could be so excluded without the opportunity for a hearing (p. 747, n. 2) we deliberately stated that we "need not decide" that question because the case could be resolved otherwise. I think that such a practice should have been followed by the District Judge in the case at bar with, perhaps, the consequence that such a wide reaching and unsettling result would not have been reached.

In my view, the State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff

David Roth might have had in continued employment at Wisconsin State University.[1]/ I believe that the teaching of *Cafeteria Workers v. McElroy, supra,* supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state educational systems. It is one thing to recognize that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton,* at page 487), and that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines County School Dist.,* 393 U.S. 503 (1969) but it is quite another to hold that anxiety over hypothetical infringements of unknown constitutional freedoms demands that states accord the full panoply of procedural due process guarantees for those teachers whose services they designate as no longer required.

We should follow the decision in *Freeman v. Gould Special School District, supra,* where the Court held that "Probationary instructors whose contracts were not renewed, were not entitled to a hearing with notice."

I respectfully dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[1] It is interesting to note that Roth signed his one year teaching contract presumably with full knowledge of the Wisconsin Statute (Wis. Stat. Ann. Sec. 37.31) which does not provide for a hearing or statement of reasons in the event that his contract was not renewed. On the other hand, in *Birnbaum v. Trussel,* 371 F. 2d 672, relied upon heavily by the majority, it appears that there was some pre-existing state requirement that a hearing be provided for physicians who were to be discharged. While this factor by itself cannot, of course, be determinative, due to the Supremacy Clause, it is clear that Roth's "expectancy" in continued employment and in the procedures to be followed in terminating that employment differed sharply from that of Dr. Birnbaum. On other distinctions between the expectancies of teachers as opposed to physicians, see *Freeman, supra,* at 1160.

OPINION AND ORDER
OF
DISTRICT COURT

MEMORANDUM (OPINION) AND ORDER

From the pleadings, depositions, and affidavits on file, I find that there is no genuine issue as to the following material facts:

Plaintiff was retained by the defendants as an assistant professor at Wisconsin State University-Oshkosh on a one-year contract for the school year 1968-1969. He had not attained tenured status under Wisconsin statutes. During the 1968-1969 school year at the university, there were disturbances and controversies concerning the university administration and the defendants. The plaintiff was vocal in his expressions of opinion with respect to such disturbances and controversies. Such expressions were critical of the university administrators and the defendant board of regents. The plaintiff was advised on January 30, 1969, by the defendant Guiles, the president of the university, purporting to act under due authority, that the plaintiff would not be offered an employment contract as a member of the university faculty for the school year 1969-1970; no reasons for the decision were given. The defendants did not offer the plaintiff a hearing of any kind on the merits of the decision. No hearing was requested by him; none was held. Of 442 non-tenured teachers at the university, four were given notice that contracts would not be offered them for 1969-1970.

The complaint alleges, among other things, that the reason for the decision not to offer plaintiff a contract for 1969-1970 was to retaliate against him for his expressions of opinion in the exercise of his freedom guaranteed by the First and Fourteenth Amendments; that the decision was not made under "ascertainable and definite standards governing the Defendants

in making this decision"; and that the decision has caused and will cause damage to plaintiff's professional reputation and standing. The complaint seeks judgment that plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution have been violated: by the very decision not to re-employ him; by failure of the defendants to provide a hearing as to the merits of said decision; by the refusal of the defendants to give reasons for their decision; and by defendants' failure to make such decision under ascertainable and definite standards. Further, the plaintiff's complaint seeks an order directing the defendants to employ him in his position as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970.

Among other things, the answer denies that the reason for the decision was to retaliate against plaintiff for his expressions of opinion, alleges that the reasons for the decision were that the plaintiff was guilty of substantial neglect and violation of duty, violation of university rules, and insubordination, denies that this court enjoys jurisdiction of the action, and alleges that the complaint fails to state a claim upon which relief can be granted.

Plaintiff has moved for partial summary judgment: declaring that he is entitled to a hearing on the merits of the decision not to retain him, and requiring the defendants either to provide such a hearing or to offer him a contract for the 1969-1970 school year; and also, apparently in the alternative, declaring that his constitutional rights have been violated because the decision of non-retention was not made under ascertainable and definite standards, and requiring the defendants to offer him a contract for the 1969-1970 school year.

Defendants have moved for summary judgment dismissing the action on its merits because the complaint fails to state a

claim upon which relief can be granted, because the undisputed facts show that no federal constitutional right of plaintiff has been violated by defendants, and because plaintiff has failed to exhaust his administrative remedies.

This opinion and order is confined to the competing motions for summary judgment.

Jurisdiction is present. 28 U.S.C. § 1343(3), (4); 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment

Defendants raise, directly or indirectly, three threshhold questions: whether defendants are "persons" within the meaning of 42 U.S.C. § 1983; whether defendants enjoy the protection of sovereign immunity; and whether defendants enjoy common law immunity.

Neither defendant is a municipal corporation. See *Monroe v. Pape*, 365 U.S. 167 (1961). This is an action for declaratory and injunctive relief, not damages. See *United States ex rel. Lee v. State of Illinois*, 343 F. 2d 120 (7th cir. 1965); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585, 587 (7th cir. 1961). For the purposes of this action, defendants are "persons" under 42 U.S.C. § 1983.

Neither the Eleventh Amendment nor the doctrine of *Hans v. Louisiana*, 134; U.S. 1 (1890) affords these defendants the shield of sovereign immunity in this action for declaratory and injunctive relief in which it is alleged that, acting under color of state law, they have deprived plaintiff of rights secured to him by the Constitution of the United States. *Ex parte Young*, 209 U.S. 123 (1908); *Whitner v. Davis*, 410 F.2d 24 (9th cir. 1969); *Baker v. Louisiana State Board of Education*, 339 F.2d 911 (5th cir. 1964); *Board of Supervisors of Louisiana State*

University v. Fleming, 265 F.2d 736 (5th cir. 1959); *Orleans Parish School Board v. Bush,* 242 F.2d 156 (5th cir. 1957), cert. den., 356 U.S. 969; *School Board of City of Charlottesville v. Allen,* 240 F.2d 59 (4th cir. 1956), cert. den. *School Bd. of Arlington County v. Thompson,* 353 U.S. 910; *Dorsey v. State Athletic Commission,* 168 F. Supp. 149 (E.D. La. 1958), aff'd 359 U.S. 533.

The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended in a qualified form to the defendant Board and university president, is to preserve the integrity and independence of those bodies, and to insure that judges and legislators will act on their free, unbiased convictions, uninfluenced by apprehensions of consequences. *Tenny v. Brandhove,* 341 U.S. 367 (1951); *Bauers v. Heisel,* 361 F.2d 581 (3rd cir. 1966), cert. den., 386 U.S. 1021; *Kenney v. Fox,* 232 F. 2d 288 (6th cir. 1956), cert. den., 352 U.S. 855. Such considerations do not support extending, nor have courts extended, the doctrine to shield officials from the type of equitable relief here requested.

We reach the major grounds of defendants' motion for summary judgment of dismissal.

The defendants' principal contention is to this effect: Plaintiff was hired for a one year period. There was no breach or threatened breach of that contract by the defendants. As a non-tenured teacher, plaintiff can be removed "'at pleasure" under Sec. 37.11(3), Wis. Stats. Such complete discretion in defendants is essential to keep the faculty at the "highest level of competency, responsibility, and devotion to duty". The administrative decision not to rehire can be reached for "no reason or any reason". It follows that no statement of reasons need be given, nor hearing offered.

If a decision not to renew the employment contract of a non-tenured university professor may be based consciously and deliberately on the fact that he has written a scholarly letter to the newspaper in support of the President's policy on Viet Nam, or on the fact that he is white, or on the fact that he is a Protestant, or on the fact that he is a Republican, and if the decision may be based on the university president's belief that the professor physically struck a student at a certain time and place, whereas in fact the professor was not present at that time and place and the incident never occurred, and if there need be no reasoned basis whatever for the decision, then it may be concluded that the Constitution of the United States affords him no substantive protection. If he enjoys no substantive protection under the Constitution - that is, if the decision not to renew may be based upon any reason or may be based upon no reason - then it also follows that he need be afforded no procedural protection by the Constitution; to require the university administration to state the reason for the decision, or to state that there is no reason for the decision, or to provide an opportunity to the professor to be heard, would serve no purpose.

On the other hand, if the Constitution of the United States forbids a decision consciously and deliberately based on the professor's otherwise protected speech activity, or his race, or his religion, or his political affiliation, then this substantive right may require procedural protection. (For the purposes of this opinion, for convenience and brevity, I will refer to an alleged right of this kind as a "First Amendment" right, although this does not accurately reach the matter of racial discrimination, for example.)

Also, if the Constitution forbids a decision based upon a wholly false assumption (for example, that the professor struck

the student), or if it forbids a decision which is wholly unreasoned, then this substantive right may also require procedural protection. (For convenience, I will refer to an alleged right of this kind as a right to be protected against an "arbitrary" decision.)

With respect to substantive protection of a professor's "First Amendment" rights, the rule is crystal clear. The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605, 606 (1967); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th cir. 1968), *Bomar v. Keyes*, 162 F.2d 136 (2d cir. 1947), cert. den. 332 U.S. 825. This substantive constitutional protection is unaffected by the presence or absence of tenure under state law. *Johnson v. Branch*, 364 F.2d 177 (4th cir. 1966), cert. den. 385 U.S. 1003; see *McLaughlin v. Tilendis, supra; Bomar v. Keyes, supra; Lucia v. Duggan*, 303 F. Supp. 118 (D. Mass. 1969). Nor is it material whether employment is terminated during a given contract period, or not renewed for a subsequent period. *McLaughlin v. Tilendis, supra.*[1/]

With respect to substantive protection against arbitrary non-retention, there is some uncertainty in the present state of the law. To test the point, we must assume a situation in which there is in fact no "First Amendment" problem; that is, the basis for non-retention is definitely not that the professor has exercised that freedom secured to him by the Constitution. The

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[1/] Because this distinction is not material in this Circuit for this constitutional purpose, I will use the term "non-retention" hereinafter to cover both situations.

question, then, is whether the Fourteenth Amendment permits non-retention on a basis wholly without factual support, or wholly unreasoned.

The most recent guidance from the Supreme Court appears to be *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960). Rachel Brawner was employed as a cook by a private firm which operated a food concession on the premises of the Naval Gun Factory. Access to the Factory grounds depended upon an identification badge. Mrs. Brawner was required by the government's security officer to turn in her pass: The stated reason was that she had failed to meet the security requirements of the installation; no more specific reason was stated. There was no hearing provided. The effect of surrendering the badge was to lose access to the site of Mrs. Brawner's job as a cook.

The Court stated that it was required first to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895. The private interest affected "most assuredly was not the right to follow a chosen trade or profession. . . . Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her then private employer] or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S., at 895-896. On the other hand, the governmental function involved was "as proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S. at 896.

There follows a puzzling passage (896-899) in which the Court appears initially to affirm "a settled principle that government employment, in the absence of legislation, can be

revoked at the will of the appointing officer" (896); then to acknowledge that *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Wieman v. Updegraff*, 344 U.S. 183 (1952) demonstrate "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer" (897-898); then to say that not all state and federal employees "have a constitutional right to notice and a hearing before they can be removed" (898); then to "assume" that Mrs. Brawner "could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory - that she could not have been kept out because she was a Democrat or a Methodist" (898); and then to say that it does not follow "that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract" between the government and her private employer (which contract provided that the private firm should not continue to employ on that site persons who failed to meet the government's security requirements) (898). Finally, the Court concluded that a determination that Mrs. Brawner "failed to meet the particular security requirements of that specific military installation" was not to "bestow a badge of disloyalty or infamy" upon her, and was not to impair her opportunities for employment elsewhere either by a public or private employer. (898-899).

Four members of the Court, in dissent, observed that the Court had recognized that Mrs. Brawner's job as a short-order cook at a Gun Factory was constitutionally protected against termination "on grounds of her race, religion, or political opinion", but had seemed to say that "mere assertion by government that exclusion is for a valid reason forecloses further inquiry." 367 U.S., at 900. The dissenters expressed the view

that Mrs. Brawner was entitled to some minimal procedures to apprise her in some detail of the reason for removing her badge, and to give her some opportunity to defend. Finally, the dissenters disagreed with the Court's estimate of the future consequences to Mrs. Brawner flowing from being characterized as a "security risk." 900-902.

In the present case I consider myself bound by *Cafeteria Workers v. McElroy* to undertake the balancing process described there: that is, to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895.

Turning first to "the precise nature of . . . the private interest . . . affected," I start with the Court's observation that Mrs. Brawner's interest was "the opportunity to work [as a short-order cook] at one isolated and specific military installation." 367 U.S., at 896. The significance of the terms "isolated" and "specific" in this context is not easily grasped. Apparently the Court meant to contrast the termination of Mrs. Brawner's employment at the Gun Factory, with an order excluding her from employment as a short-order cook on the sites of all military installations, or to contrast it with an order revoking the license of a lawyer or a medical doctor or a real estate broker. The underlying significance appears to be that the effect of the termination was not seriously to limit Mrs. Brawner's future economic opportunities. The interest of the plaintiff here might also be viewed as "the opportunity to work [as a professor] at one isolated and specific university." The termination of this opportunity might also be contrasted with an order excluding him from employment at all universities and colleges, or with the revocation of the license of a lawyer or medical doctor or real estate broker. But the parallel with Mrs. Brawner's case falters here because the relationship between one cook and all

prospective employers of short-order cooks differs, as I now judicially notice, from the relationship between one university professor and all prospective employers of university professors. Without disrespect, I think it fair to say that the discharge from one job is a lesser impediment in the search for another in the case of short-order cooks than in the case of university professors.

Turning to "the precise nature of the government function involved," I start again with the Court's observation in *Cafeteria Workers v. McElroy*. It found the government function there to be:

> "[A]s proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S., at 896.

The emphasis here seems to be that the government function involved was proprietary rather than regulatory; that it was one of internal operation of an establishment; that the establishment was important; that it was military; and that there is a tradition of unfettered control by the federal government over its proprietary military installations. The interest of the state government in the present case is also proprietary rather than regulatory; it involves the internal operation of an establishment; and the establishment is important. The establishment is educational in nature, rather than military. Whether in its proprietary educational capacity the state government "has traditionally exercised unfettered control" is a question not instantly answerable. It seems fair to say, however, that historically the governance of public institutions of higher learning by the state has been less authoritarian than the governance of miliary installations by the federal government.

But to give effect to the balancing test of *Cafeteria Workers v. McElroy* obviously requires more than literal application of its language to the present situation, and more than labored comparisons between short-order cooks and professors, and between federal gun factories and state universities. We are dealing here with institutions of higher learning in this country, and perhaps abroad, and we are dealing with professors in those institutions.

I am called upon to consider the interest of the university in assembling and preserving a community of teachers and scholars. I am to consider how vital it is to this interest that during a relatively short initial interval, the university be free arbitrarily to decide not to retain a professor, so long as its decision is not based upon his exercise of freedoms secured to him by the Constitution. The concept of tenure obviously enjoys a rational basis, as well as a traditional basis. It is reasonable that there be a time in which to observe a new teacher and scholar and that the university retain during that time a considerable latitude in deciding whether he should remain. It is reasonable that after a period of time, or after the newcomer has won a certain measure of acceptance reflected in his academic rank, he should acquire rather strong protection against non-retention; such an arrangement is conducive to productive and perhaps controversial effort. Thus it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues. And it is reasonable that thereafter this available spectrum of reasons be sharply narrowed and confined to those amenable to articulation or demonstration.

The core issue here, however, is more difficult. No interest of the university is directly served by a regime in which a

decision not to retain a newcomer may be made upon a basis wholly without support in fact or by a decision upon a wholly unreasoned basis. If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between tenure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.

As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason; whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.

The balancing test of *Cafeteria Workers v. McElroy* compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason. This standard is intended to be considerably less severe than the standard of "cause" as the latter has been applied to professors

with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons.

In deciding to afford to professors in a state university substantive protection against arbitrary non-retention, I am strengthened by an awareness that this is consistent with the development of the law with respect to public employment generally. The time is past in which public employment is to be regarded as a "privilege" which may be extended upon any conditions which public officials may choose to impose. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Davis, the Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 234 (1956). In *Birnbaum v. Trussel,* 371 F.2d 672, 678 (2d cir. 1966), after a review of the decisions of the Supreme Court and other courts, it was said that the "principle to be extracted from these cases is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist."

The latter comment brings me to a conclusion which follows inexorably from what I have said. Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of

the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place.[2]/ At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[3]/

I conclude that the defendants' motion for summary judgment dismissing this action must be denied for the reason that it is undisputed that no statement of reasons for non-retention was given to the plaintiff, and no notice was given him that he would be heard at a stated time and place in response to the stated reasons.

Defendants' motion must be denied for another reason. They contend that the record in this court -- by affidavits, depositions, and pleadings - makes it clear that the decision not to retain this particular plaintiff enjoyed a basis which was

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[2]/ I do not intend to foreclose more considerate procedures, which permit the professor to waive procedural rights, voluntarily and knowingly. For example, the initial notice that non-retention is being considered may say that if the professor makes a written request, within a stated interval, a written statement of reasons will be supplied him, and that he will be provided with hearing at which he may respond; otherwise, he will simply be furnished with a letter announcing the decision without a statement of reasons. Also, even at the point at which a written statement of reasons is furnished, the professor may be advised that, if he makes a request for a hearing within a stated interval, a hearing will be scheduled; otherwise, the procedure will end with the written notice of non-retention and the reasons therefor.

[3]/ It should clearly be understood that any more stringent requirements imposed by statute, custom, or otherwise, such as a showing of "cause" in the case of a tenured professor, are unaffected by this statement of minimal procedural requirements embodied in the due process clause of the Fourteenth Amendment.

reasoned, supported in fact, and not violative of plaintiff's freedom of expression.

Defendants offer *Pickering v. Board of Education*, 391 U.S. 563 (1968), in support of the contention that plaintiff's statements referred to in section 2 of Dean Darken's memorandum (upon which memorandum defendant Guiles relied in deciding not to retain plaintiff) were not entitled to First Amendment protection. In *Pickering* the unsuccessful Board contended that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." *Pickering, supra,* at 568-569. Defendants make a similar argument here.

In "evaluating the conflicting claims of First Amendment protection and the need for orderly school administration", the court in *Pickering, supra,* "indicates some of the general lines along which an analysis of the controlling interest should run." *Pickering, supra,* at 569. Those guidelines coupled with certain controverted facts prevent summary judgment based upon this contention.

A teacher's freedom of speech cannot be limited unless it can be shown that his utterances harm a substantial public interest. *Pickering, supra,* at 570-571. The defendants have not exhibited beyond dispute that such injury existed. It is not uncontroverted that the plaintiff's statements diminished his effectiveness in the classroom, hampered the administration's disciplinary actions, or furthered the disturbances and disorder already occurring on the campus.

Even if it were agreed that the plaintiff's utterances were inaccurate and unsound, it is clear from *Pickering* that a factual evaluation of their consequences would become necessary:

"What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S., at 572.

Defendants argue that even if the statements of the plaintiff are constitutionally protected, section 2 of he Dean's report did not disapprove of them because they were critical of university administration, but only because they were unsubstantiated and evinced an unscholarly approach to the search for knowledge and truth. The plaintiff has alleged, and it is controverted, that the defendants relied on the public statements for more than the proposition that plaintiff was unscholarly. Plaintiff supports his argument with the contention that the defendants have presented no additional evidence which calls his competence into question. Further, he contends that the statements cited in the Darken memorandum are statements of opinion as to then existing conditions which cannot be subjected to the tests of scholarship. Factual error ordinarily affords no warrant for repressing speech otherwise free. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), motion for rehearing denied 376 U.S. 967. Whether error is to be accorded special significance here will require an evaluation of the setting in which it occurred, if it was indeed error.

Defendants further contend that the defendant Guiles in making his decision of non-retention relied upon ample non-constitutionally protected activity as set forth in section one of

Dean Darken's recommendation. This is put in dispute by the following allegations of the plaintiff:

> the defendant Guiles' decision of non-retention was based upon both sections one *and* two of Dean Darken's recommendation;
>
> even if the decision was based solely upon section one recommendations, the complaints there enumerated were only brought to light and used because of the plaintiff's criticism of university administration; and
>
> apart from the recommendation, defendant Guiles' decision was an attempt to retaliate against the plaintiff for his critical comments.

Both parties seem to agree that "a justifiable ground of discharge is not a defense when the" ground "is a *mere pretext* and not the moving cause of the discharge" (Defendants' Reply Brief in Support of Defendants' Motion, at p. 7; underlining in the original). The plaintiff has so alleged and should be allowed to attempt to prove it. Obviously, a non-retention decision based upon activity which is not constitutionally protected, is a valid decision. But a decision based in part on protected activity and in part upon unprotected activity is not a valid decision. In the present case it appears that a determination as to the actual bases of decision must await amplification of the facts at trial. *Beilan v. Board of Education*, 357 U.S. 399, 412 (1958) (Warren, C. J., dissenting). Summary judgment is inappropriate.

Plaintiff's Motion for Partial Summary Judgment

There is a contrast between the relief sought in the complaint herein and the relief sought in the plaintiff's motion for partial summary judgment.

The allegations of the complaint embody an attack on the non-retention decision on both substantive and procedural grounds. The substantive grounds alleged are that the decision was based upon plaintiff's earlier expressions of opinion, and that there were no ascertainable and definite standards upon which the decision could be based.[4]/ The procedural grounds alleged are that the defendants refused to give reasons for their decision, and that they did not offer the plaintiff a hearing on the merits of the decision. The relief asked is a declaratory judgment with respect both to the substantive and procedural grounds, and an injunction requiring defendants to offer the plaintiff a contract for the 1969-1970 academic year.

The motion for a partial summary judgment, however, prays, apparently in the alternative: (a) that defendants either provide plaintiff with a hearing on the merits of his non-retention or offer him a contract for 1969-1970; or (b) that defendants offer him a contract for 1969-1970 because the non-retention decision was not made on any ascertainable and definite standards. Thus the motion for summary judgment introduces a prayer for an order to compel defendants to provide procedural safeguards within the university.[5]/

Plaintiff might have elected to come here under 42 U.S.C. § 1983 and to seek only an order compelling defendants to offer him a contract for 1969-1970, alleging that the non-retention decision had actually been based on his exercise of First Amendment freedoms, and that there were no ascertainable rules and regulations of conduct governing faculty members upon which

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[4]/ Perhaps the contention concerning the absence of ascertainable and definite standards may be described as procedural rather than substantive. I understand the contention to be that there had not been made known to the plaintiff, in advance, rules and regulations sufficiently definite and specific to serve as a guide to conduct. I compare this with contentions that substantive rules of conduct are vague or overbroad.

[5]/ Since the complaint includes a prayer "for such other and further relief as may be equitable," the plaintiff is not foreclosed from seeking this specific relief in his motion for a partial summary judgment.

the non-retention decision could have been based. Had he done so, he would not have been required to exhaust whatever state administrative or judicial remedies might have been available to him. *Damico v. California*, 389 U.S. 416 (1967).

On the other hand, plaintiff might have elected to come here under 42 U.S.C. § 1983, allege that he had been given no reasons for his non-retention and had been afforded no hearing on the merits of the decision, and to seek only an order compelling the defendants to provide him with these procedural safeguards within the university.

In this situation, I will consider first that alternative motion by the plaintiff for partial summary judgment in which he seeks an order compelling defendants to offer him a contract for 1969-1970 on the ground that the non-retention decision was not made on any ascertainable and definite standards. The motion must be denied. The contention appears to be that a non-tenured employee is constitutionally entitled to be told in advance that if he does not comply with certain reasonably specific standards of conduct, he will not be offered a contract for the following year. See *Soglin v. Kauffman*, 418 F.2d 164 (7th cir. 1969) (relating to students in a public university). The necessary implication is that if he does abide by these previously announced standards of conduct, he will be entitled to a contract for the following year. As I have explained above in discussing defendants' motion for summary judgment, it is important that in deciding whether to retain a non-tenured professor, the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of his First Amendment rights. To accept the plaintiff's contention would be to erect a constitutional requirement even more severe than the showing of "cause" now required by Wisconsin law in the case of tenured professors. So far as the federal constitution is concerned - as distinguished

from state statutes, regulations, collective bargaining agreements, or traditions - I have held that due process affords professors (tenured or non-tenured) protection only against non-retention based on their exercise of constitutional freedoms and against non-retention based on arbitrariness. To provide this limited protection it is not necessary to require that the university enunciate in advance a code of conduct for professors, violation of which will result in non-retention and compliance with which will result in retention.

This brings me to the remaining alternative motion by the plaintiff for a partial summary judgment: that defendants be compelled either to provide him with a hearing on the merits of his non-retention or to offer him a contract for 1969-1970. For reasons stated in my discussion of defendants' motion for summary judgment, I have concluded that this alternative motion must be granted, with modifications. That is, upon the facts not in dispute, I believe that as of January, 1969, the plaintiff was constitutionally entitled to be provided with a statement of the reasons why he was not to be retained for the year 1969-1970, to be given notice of a specific time and place for a hearing at which he could respond to the stated reasons, and to be given the hearing itself if he appeared at the stated time and place; in the absence of being provided these procedural safeguards, he was entitled to be retained in 1969-1970. Because of the passage of time while this action has been pending in this court, the relief must be modified somewhat, and the specific order of the court is as stated below.

Because the plaintiff is being furnished the procedural relief which he has sought in his motion for partial summary judgment, I stay further proceedings in this court on what appear to be the only remaining issues: whether in fact non-retention was based upon plaintiff's earlier expressions of opinion or was arbitrary. If the plaintiff is now furnished with

a statement of the reasons for his non-retention, notice of an administrative hearing, and a hearing, I believe that the remaining issues in this case will have been clarified and that they will become more amenable to resolution.

Order

It is ordered that defendants' motion for summary judgment is hereby denied.

It is ordered that plaintiff's motion for a partial summary judgment that his rights were violated by defendants' decision not to retain him for the school year 1969-1970 because said decision was not made under ascertainable and definite standards, and for partial summary judgment that defendants be ordered to offer him a contract as a faculty member for the school year 1969-1970 (or any subsequent time), is hereby denied.

It is hereby ordered and adjudged that on or before March 20, 1970, the defendants herein are to cause to be delivered to counsel for the plaintiff herein a written statement of the reasons upon which the defendants relied in deciding not to offer plaintiff a contract for the 1969-1970 academic year; that on or before March 20, 1970, plaintiff's attorneys are to inform defendants' attorneys in writing of all dates after April 1, 1970, and prior to June 30, 1970, upon which plaintiff would be able to appear for a hearing in Oshkosh, Wisconsin; that on or before March 27, 1970, defendants are to cause to be delivered to counsel for the plaintiff herein a notice of a hearing at an appropriate place in Oshkosh, Wisconsin, on a date which is among those designated by the plaintiff and which is not less than ten days subsequent to the date on which notice is delivered to plaintiff's counsel; that said notice is to advise the plaintiff that at the specified place and time, he will be given

an opportunity to respond to the reasons stated for his non-retention; that at the said time and place, if plaintiff appears, he will be given an opportunity to respond to the reasons stated for his non-retention; that within 15 days after the date of said hearing, the defendants will notify plaintiff's counsel herein either that he will not be offered a further contract with the university or that he is being offered a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969. It is hereby further ordered and adjudged that should the defendants elect not to comply with the immediately preceding order by providing the plaintiff with a statement of reasons for his non-retention, notice of hearing, and hearing, then the defendants shall be required, on or before June 1, 1970, to offer the plaintiff a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969.

Entered this *12th* day of March, 1970.

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, JULY 14, 1971

Before

Hon. *THOMAS E. FAIRCHILD, Circuit Judge*

Hon.

Hon.

DAVID F. ROTH, etc.,
Plaintiff-Appellee,

No. 18490 vs.
THE BOARD OF REGENTS OF STATE COLLEGES, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

On consideration of the motion of counsel for defendants-appellants,

IT IS ORDERED that the issuance of the mandate of this Court be stayed for thirty (30) days in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

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No. 71-162

SEP 4 1971

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

Brief In Support Of Petition For A Writ Of Certiorari Of The Board Of Governors Of State Colleges And Universities Of Illinois, The Board Of Regents Of Regency Universities Of Illinois, The Board Of Trustees Of Southern Illinois University, The American Association Of State Colleges And Universities, The American Council On Education, The Association Of American Colleges And The National Association Of State Universities And Land-Grant Colleges As Amici Curiae.

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INTEREST OF THE AMICI CURIAE

The amici are national associations whose members constitute almost all of the colleges and universities in the nation, public and private, and public boards administering colleges and universities in Illinois.

The American Council on Education is the nation's largest association of colleges and universities. Its membership includes 1,343 institutions of higher education and 213 national and regional associations and 83 affiliated institutions and organizations concerned with higher education in the United States. The American Association of State Colleges and Universities has a membership of 275 state colleges and universities enrolling approximately 1.8 million students. The Association of American Colleges has a membership of 893 colleges which includes all private liberal arts colleges in the United States as well as several public liberal arts colleges. The National Association of State Universities and Land-Grant Colleges has a membership of 114 public colleges and universities. The public boards are the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, and the Board of Trustees of Southern Illinois University.

Because this case questions customary practices at approximately 1080 public colleges and universities in the United States, with almost 300,000 faculty members and 6,000,000 students, the *amici* have submitted this brief in support of the petition for a writ of certiorari. The petitioners and respondent have consented to the filing of this brief.

The opinions of the courts below, jurisdictional statement, statement of the question presented, statutes involved, and statement of the case are contained in the petition.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals Disturbs The Operation Of The Tenure System In Effect At Almost All State Colleges And Universities.

The court of appeals held that, whenever a probationary faculty member is not tendered a contract for a forthcoming academic year, he is constitutionally entitled to a statement of reasons and a hearing to establish that the true reasons for not tendering the contract were improper or that the stated reasons were arbitrary.

For many decades, almost all American colleges and universities* have operated under a tenure system which provides that notice and a hearing be afforded only to those faculty members who have been granted tenure. *Developments In the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1100-01 (1968). As in the instant case, many of the state college tenure systems are created by statute. In most states, tenure systems exist pursuant to rules and regulations duly adopted by the college's governing board.

Prior to achieving tenure, a college instructor serves in a probationary status, usually pursuant to an annual contract, for a limited number of years, during which a college customarily may fail to renew his contract without affording him a statement of reasons and a hearing. 81 Harv. L. Rev. at 1090-91, 1101. In contrast, once an instructor gains tenure, he may be removed only for cause

* Hereinafter, "college" shall be used to refer to both colleges and universities.

upon written charges and after a hearing. 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States* 971 (3rd Ed. 1967).

The tenure system is intended to protect the instructor's academic freedom by preventing punitive discharges and requiring that proper cause be shown prior to discharge. At the same time, the tenure system recognizes the objective of high-quality education by permitting the college to observe and evaluate the instructor in the probationary period before he receives the security afforded by tenure. The tenure system protects academic freedom as well as academic excellence, and strikes a balance between both these important goals.

Although the court of appeals purported to preserve the distinction between probationary and tenured faculty members, it awarded to probationary faculty members notice and hearing rights customarily reserved to tenured faculty. Whether the "prophylactic" procedures contemplated by the court of appeals would help to protect probationary instructors' rights is doubtful. (See dissenting opinion of Judge Duffy, App. 211). Even so, the need for hearings would burden college faculty and administrators and would thus interfere with a college's ability to assure quality education to its students.

The men and women who must make contract renewal and tenure decisions may be inclined to grant tenure by default rather than face the added administrative burdens imposed by the court of appeals' decision. This is no idle fear. Most colleges place initial responsibility for these personnel decisions in the hands of committees composed of the instructor's academic colleagues. These academicians by and large are preoccupied with their own teaching and research and are not inclined to relish the handling of

dossiers, preparation of administrative memoranda, and attendance at numerous hearings and business meetings. Abrogation by college personnel of their traditional evaluative functions would result in the grant of tenure to many otherwise inappropriate instructors. Sooner or later an intolerable strain would be placed on the tenure system, as pressure mounted to rid the faculty of instructors who should not have been granted tenure in the first instance. The protection to academic freedom once afforded by tenure will have been weakened.

Therefore, the issue in this case is not whether academic freedom should be protected, but whether the means adopted by the court of appeals will protect or harm that freedom. The tenure system involves compromises that have emerged over time amidst the realities of college life. It cannot be assumed that the system will cease to evolve. The state authorities who have responsibility for higher education should be left free as they have been in the past to develop techniques for maximum protection of faculty freedoms, while insuring academic excellence. The increased federal authority over the day-to-day affairs of state colleges which is countenanced by the court of appeals promises to harm, not enhance, academic freedom.

The decision below upsets the delicate balance which the tenure system has maintained between protecting academic freedom and assuring academic excellence.

This Court should grant the petition for a writ of certiorari and review a decision which tampers with a successfull and ongoing system at the cornerstone of First Amendment freedoms.

II.

The Decision Of The Court Of Appeals Conflicts With The Decisions Of All Other Circuits Which Have Considered The Constitutionl Rights Of Probationary Instructors.

The Seventh Circuit is the only circuit to grant the right to a statement of reasons and a hearing to a probationary instructor in every case in which the instructor alleges improper or arbitrary non-retention. Furthermore, the other circuits which have considered the question are not completely in agreement.

The Fourth, Sixth, Eighth and Tenth Circuits have held that non-tenured instructors are not entitled either to a statement of reasons or to a hearing. *Parker* v. *Board of Education of Prince George's County, Md.*, 237 F.Supp. 222 (D. Md. 1965), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *Orr* v. *Trinter*, No. 20721 (6th Cir., June 16, 1971); *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969); *Jones* v. *Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1969), followed in *Schultz* v. *Palmberg*, 317 F.Supp. 659 (D.Wyo. 1970).

The Fifth Circuit has held that, at institutions lacking a tenure system where all instructors are indefinitely employed pursuant to annual contracts, the instructor has the right to a hearing with a prior statement of reasons if he has an *expectancy* of reemployment. *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir. 1970); *Lucas* v. *Chapman*, 430 F.2d 945 (5th Cir. 1970); *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 39 U.S. L.W. 3548 (June 14, 1971). However, at institutions having a tenure system, a non-tenured, *probationary* instructor, such as respondent, is not considered by the Fifth

Circuit to have an expectancy of reemployment and is not routinely entitled to a hearing upon request if his contract is not renewed. *Thaw* v. *Board of Public Instruction of Dade County, Fla.*, 432 F.2d 98 (5th Cir. 1970).

The First Circuit has held that, although a non-tenured, probationary instructor has a right to a statement of reasons, he is not entitled to a hearing. *Drown* v. *Portsmouth School District*, 435 F.2d 1182 (1st. Cir. 1970), *cert. denied*, 39 U.S.L.W. 3511 (May 17, 1971).

Therefore, to date, decisions in these seven circuits have led to at least four inconsistent rules of law governing the procedural due process rights of non-tenured instructors. The *amici*, which include among them four national associations of institutions of higher learning, urge this Court to grant the petition for a writ of certiorari to put an end to this harmful conflict of authority.*

III.

This Court Has Granted Certiorari In The Case Of Perry v. Sindermann, Which Poses A Related But Distinct Question, And The Perry Case Should Be Considered Together With This Case.

On June 14, 1971, this Court granted certiorari in the case of *Perry* v. *Sindermann*, No. 70-36. Respondent in-

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* Contrary to the First, Fifth and Seventh Circuits, and in agreement with the Fourth, Sixth, Eighth and Tenth Circuits, the highest courts of the states of Missouri and Massachusetts have recently held that a non-tenured instructor does not have a constitutional right either to a statement of reasons for the non-renewal of his contract or to a hearing to respond to those reasons. *De Cayio* v. *School Committee of Boston*, 260 N.E. 2d 676, 681 (Mass. 1970), *cert. denied*, 91 S.Ct. 925 (1971); *Williams* v. *School Dist. of Springfield R-12*, 447 S.W. 2d 256, 270 (Mo. 1969).

structor in the *Perry* case was employed at a junior college which did *not* have a tenure system. Instead, instructors at that institution were non-tenured, non-probationary instructors, indefinitely employed pursuant to annual teaching contracts, who could never obtain the security of tenure. The Fifth Circuit held that, if non-tenured, non-probationary instructors can show that they have an expectancy of reemployment, they are entitled to a hearing with a prior statement of reasons. *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970).

However, respondent Roth, like most college instructors in the United States, was employed at a college with a tenure system. His annual contract was not renewed past his first year of employment. The Fifth Circuit has held that a probationary instructor at a school with a tenure system, such as respondent, is not routinely entitled to the procedural rights which it granted in *Perry* to instructors at schools without tenure systems. *Thaw* v. *Board of Public Instruction of Dade Co., Fla.*, 432 F.2d 98 (5th Cir. 1970).

The *amici* respectfully suggest that this Court grant the petition for a writ of certiorari and consider the instant case together with *Perry* v. *Sindermann*. If this Court were to consider the *Perry* case alone, dealing with a junior college which lacks a tenure system, confusion might persist among the overwhelming majority of colleges which have tenure systems. Even if this Court were inclined to require colleges without tenure systems to provide reasons and a hearing, the *amici* suggest that colleges with tenure systems should not be required to do so. The procedural rights of probationary instructors should be finally determined by this Court so that all colleges can fashion personnel practices within the same constitutional rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion delivered in the court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on July 1, 1971, Dkt. No. 18490. The opinion of the District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 and is printed in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether a non-tenured state university professor who alleges that the refusal to renew his employment for another school year is based upon his exercise of First Amendment rights is entitled to minimal due process, including a statement of reasons and a hearing, before the refusal to renew his employment can be accomplished?

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

REASONS FOR NOT GRANTING THE WRIT

I. THE SEVENTH CIRCUIT DECISION IN THIS CASE IS CONSISTENT WITH DECISIONS OF THIS COURT.

Although this Court has never dealt at length with the question of what procedural protections must be extended to non-tenured state university professors before decisions not to renew their employment can be accomplished,* it is clear that there is no conflict between the Seventh Circuit decision in this case and other decisions of this Court. In fact, the decisions below have both followed *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961), in carefully evaluating the competing public and private interests which must be balanced in order to determine what procedures due process requires. This "balancing test" has recently been summarized as follows:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interests in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said

*The substantive constitutional protections of the First Amendment have been applied to non-tenured teachers. See, *e.g.*, *Keyishan v. Board of Regents*, 385 U. S. 589 (1967); *Connell v. Higgenbotham*, 91 S. Ct. 1772 (1971); and, *Shelton v. Tucker*, 364 U. S. 479 (1960).

> in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), 'consideration of what procedural due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.'" *Goldberg v. Kelly*, 397 U. S. 254, 262-263 (1970).

See also, *Wisconsin v. Constantineau*, 91 S. Ct. 507 (1971) and *Bell v. Burson*, 91 S. Ct. 1586 (1971).

In urging this Court to grant certiorari, petitioners have asserted that the decision of the Seventh Circuit is in conflict with decisions of this Court which have established the existence of a governmental power to "summarily discharge" employees "at any time without the granting of a reason." *Cafeteria Workers*, 367 U. S. at 896, *citing Vitarelli v. Seaton*, 359 U. S. 535, 539 (1959). Such language, however, represents the absolutist position that was rejected in *Cafeteria Workers* when this Court established the "balancing test" to be used in determining what procedural protections must be provided to persons threatened with arbitrary government action. Moreover, such absolute power to summarily discharge employees would be inconsistent with this Court's vigilant protection of constitutional freedoms in the academic community. See, *e.g.*, *Shelton v. Tucker*, 364 U. S. 479, 487 (1960); *Weiman v. Updegraff*, 344 U. S. 183, 195 (1952); *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

In striking the balance in favor of providing procedural protections to non-tenured teachers faced with nonretention, the Seventh Circuit considered not only the danger to First Amendment right posed by the "summary

dismissal" power claimed by the university employer but also the "substantial adverse effect non-retention is likely to have upon the career interests of an individual professor," (Pet. App. 205)* Unlike *Cafeteria Workers*, "where only 'the opportunity to work at one isolated and specific military installation' was involved," see *Willner v. Committee on Character & Fitness*, 373 U. S. 96, 103, n. 2 (1963), non-retention of university professors may "jeopardize an interest in practicing a profession, or in preserving a professional reputation." (Pet. App. 205) See also *Birnbaum v. Trussell*, 371 F. 2d 672 (2nd Cir., 1966) and *Meredith v. Allen County War Memorial Hospital Comm.*, 397 F. 2d 33 (6th Cir. 1968). Consideration of these interests of a public employee is consistent with this Court's requirement that notice and an opportunity to be heard be provided

> ". . . where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Wisconsin v. Canstantineau*, 91 S. Ct. 507, 510 (1971).

This Court has also emphasized the importance of providing public employees, especially teachers, with procedural protections so that a "proper inquiry" can be made into a proposed termination of employment. In *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956), the summary dismissal of a university professor for having exercised his constitutional rights before a congressional com-

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*The page references are to the Seventh Circuit Decision which has been reproduced in the Appendix to the Petition for Certiorari.

mittee was reversed. In concluding that the "summary dismissal . . . violated due process of law," this Court stated:

> "This is not to say that Slochower had a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here.' 350 U. S. at 559.

More recently, in *Connell v. Higgenbotham*, 91 S. Ct. 1772 (1971), this Court reaffirmed the procedural due process holding of *Slochower* by striking down the portion of a Florida loyalty oath which provided for the summary dismissal of non-signing teachers "without hearing or inquiry required by due process." 91 S. Ct. at 1773. See also *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970), in which this Court cited *Slochower* and stated that: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment."

The decision of the Seventh Circuit to require the university employer to provide "minimal due process,' including a statement of reasons and a hearing on the proposed non-retention is consistent with this Court's effort to permit aggrieved teachers to examine their termniation in order to determine whether the state has a "real interest," see *Slochower*, 350 U. S. at 559, in its proposed action. It is difficult to believe that the teachers in *Slochower* and *Connell* would be less entitled, as a matter of constitutional law, to a "proper inquiry" into their terminations had their employers simply waited until the end of the current

academic year and then failed to renew their employment without stating the reason for such action or providing a hearing.

II. THE CONFLICT AMONG THE CIRCUITS RAISED BY THE DECISION OF THE SEVENTH CIRCUIT TO EXTEND PROCEDURAL PROTECTIONS TO NON-TENURED STATE UNIVERSITY PROFESSORS WHO ALLEGE THAT THE REFUSAL TO RENEW THEIR EMPLOYMENT IS BASED UPON THEIR EXERCISE OF CONSTITUTIONALLY PROTECTED FIRST AMENDMENT ACTIVITIES DOES NOT WARRANT THE GRANTING OF CERTIORARI.

Respondent acknowledges the existence of a conflict among the circuits on the broad question of what procedural safeguards, if any, must be extended to non-tenured teachers before a decision not to renew their employment may be accomplished. However, the Seventh Circuit decision in *Roth*, on its facts, does not raise the precise issue on which the circuits have split. Moreover, the conflict that does exist between the other circuits and the Seventh Circuit decision in *Roth* can be attributed to a large extent to the different positions taken on the underlying question of the substantive rights of non-tenured teachers.

The *Roth* case was decided against the background of a First Amendment controversy and, as noted by the Seventh Circuit, respondent's public expressions were considered in support of the non-retention decision. Therefore, in spite of the fact that "the principle announced by the district court applies by its terms to all non-retention decisions," the Seventh Circuit took the First Amendment controversy into consideration and concluded that

". . . an additional reason for sustaining application

> in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (Pet. App. 206)

This background of First Amendment controversy distinguishes the Seventh Circuit decision in *Roth* from the decision in the First Circuit which has required a statement of reasons but has denied a hearing and from the decision of the Sixth Circuit which has denied both. See, *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), *cert. denied*, 91 S. Ct. 1659 (1971) and *Orr v. Trinter*, Dkt. No. 20721, (6th Cir. June 16, 1971) *reversing* 318 F. Supp. 1041 (S.D. Ohio 1970), *petition for cert. filed*, 40 U. S. L. W. 3081 (U.S. August 18, 1971) (No. 71-249).

Aligned with the Seventh Circuit decision in *Roth* is the Fifth Circuit which has also ruled that a non-tenured teacher who alleges that his termination is in retaliation for his exercise of First Amendment activities is entitled to procedural protections before the non-retention can be accomplished. See *Ferguson v. Thomas*, 430 F. 2d 852 (1970); *Lucas v. Chapman*, 430 F. 2d 945 (1970); *Perry v. Sindermann*, 430 F. 2d 939 (1970), *cert. granted*, 91 S. Ct. 2226 (1971).*

In urging this Court to grant certiorari, petitioners rely

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*Subsequent to the decision in *Roth*, the Seventh Circuit held that procedural safeguards, including a statement of reasons and a hearing are to be extended to all non-tenured teachers, regardless of the existence of a First Amendment controversy. This position is in conflict with not only the Fifth Circuit but also with the First and Sixth. Compare *Schrick v. Thomas*, Dkt. No. 18790, (7th Cir. September 2, 1971), *reversing*, 315 F. Supp. 1124 (S.D. Ill. 1970) with *Thaw v. Board of Public Instruction*, 432 F. 2d 98 (5th Cir. 1970), *Drown v. Portsmouth School District*, *supra*, and *Orr v. Trinter*, *supra*.

on the Tenth Circuit position under which procedural protections are denied to all non-tenured teachers. However, such position is largely the result of the Tenth Circuit's ruling that non-tenured teachers who allege that the failure to renew their employment is based on First Amendment activities fail to state a cause of action under 42 U. S. C. § 1983. See *Jones v. Hopper*, 410 F. 2d 1323 (1969), *cert. denied*, 397 U. S. 991 (1970). Finding that non-tenured teachers have no substantive rights outside of their teaching contracts, a court might conclude that little purpose would be served in providing such teachers with a statement of reasons and a hearing. In any event, it is premature to conclude that a conflict exists between the Seventh and Tenth Circuits on the question of the procedural rights of non-tenured teachers until the even more fundamental conflict between these Circuits on the question of the substantive rights of non-tenured teachers is resolved. Compare *Jones v. Hopper, supra*, with *McLaughlin v. Tilendis*, 398 F. 2d 287 (7th Cir. 1968) and *Perry v. Sindermann, supra*, (5th Cir. 1970), *cert. granted*, 91 S. Ct. 2226 (1971). Similarly, the position of the Eighth Circuit in *Freeman v. Gould Special School District*, 405 F. 2d 1153, *cert. denied*, 396 U. S. 843 (1969), can be attributed to that Circuit's unwillingness to extend the substantive protections of due process to non-tenured teachers and thus involve the Federal Courts in what it considers to be the internal operations of school boards.

Since this Court has granted the petition for a writ of certiorari in *Perry v. Sindermann, supra*, it is likely that the split between the Fifth Circuit and the Tenth Circuit decision in *Jones v. Hopper, supra*, on the question of the substantive First Amendment rights of non-tenured teach-

ers will soon be resolved. However, respondent notes that the *Perry* case also raises questions as to the procedural rights of such non-tenured teachers. Nonetheless, respondent respectfully urges this Court to deny the petition for a writ of certiorari since the procedural issues raised by the Seventh Circuit decision in the present case can best be dealt with after the present conflict among the circuits on the underlying substantive questions is resolved.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

IN REPLY TO RESPONDENT'S BRIEF

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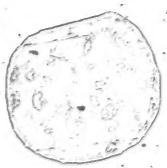
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

IN REPLY TO RESPONDENT'S BRIEF

I. The Issue Is Not Accurately Stated In Respondent's Brief

We have always considered the decision in *Roth* to require a statement of reasons and hearing whenever demanded by the public probationary employe regardless of whether the employe coupled that demand with the claim that nonrenewal was based on constitutionally protected activity. It is clear from Respondent's footnote on page 9 of his brief that this is the correct reading of *Roth*. The footnote refers to *Shirck v. Thomas, et al.* (7th Cir. 1971, decided September 2, 1971,

No. 18790). This case, relying on *Roth*, clearly holds that a probationary teacher is entitled to a statement of reasons and hearing whenever demanded and regardless of any claim that nonrenewal was based on constitutional activity.

Accordingly, Respondent's framing of the issue is incorrect.

Nor can there by any doubt as to whether the *Roth* decision applies to all public probationary employment. The Court relying on *Roth* and on *Gouge v. Joint School District*, 310 F. Supp. 984 (W.D. Wis. 1970), in *Myrsiades v. Towne*, (W.D. Wis., decided October 4, 1971, No. 70-C-52), denied the employer's motion to dismiss the complaint, holding:

> "I now conclude and hold that in some measure, a vocational rehabilitation counselor employed by a state government on a probationary basis is entitled to procedural protections with respect to a decision to terminate his employment.
>
> "The procedural constitutional guarantees available to one in plaintiff's position — a probationary state employee on the job for only about four months — should be minimal."/1

II. Respondent's Argument Concerning The Conflict Between The Circuits Is Unclear And Inaccurate

Respondent in framing his question as well as in his attempt to distinguish the *Roth* decision from the decisions of other circuits employs a strained interpretation of *Roth*.

/1 *State law provides for a six month probationary period, sec. 16.22, Wis. Stats.*

Respondent apparently takes the position that *Roth* is limited to those situations where there exists between the employer and the employe a First Amendment controversy. This argument appears to be based on the quoted language found on pages 8 and 9 of his brief. However, if one considers the entire sentence of which the quoted language was but a part, no such limited application or destination can be made. The entire sentence reads:

> "Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (app. 206)

Certainly the Seventh Circuit realized that no such limited application was intended in *Roth* when it decided the *Schirck* case. Just as certainly, Respondent realizes (and perhaps even concedes in his footnote) that with the decision of the Court in the *Schirck* case no valid distinction can be drawn between *Roth* and the decisions of the First and Sixth Circuits. The Seventh Circuit did not take a different position in *Schirck* but relied on *Roth*. *Roth* is as much in conflict with the decisions of the First and Sixth Circuits as Respondent admits the *Schirck* case to be. The dissenting opinion in *Roth* (App. 207-216) as well as Respondent's own brief shows the real and extensive conflict between the decision in

Roth and the decisions of the First, Fifth, Sixth, Eighth and Tenth Circuits.[2]

We have been advised that a petition for certiorari has been filed (August 18, 1971) in *Orr v. Trinter*. It is respectfully requested, that should the petition in that case be granted as well as in this case, that these matters be consolidated with the pending case of *Sindermann v. Perry*.

It is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Attorney General of Wisconsin

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[2] *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), Cert. denied, 39 U.S.L.W. 3511 (May 17, 1971)
Sindermann v. Perry, 430 F. 2d 939 (5th Cir. 1970), Cert. granted No. 70-36
Orr v. Trinter, No. 20721 (6th Cir. June 16, 1971)
Freeman v. Gould Sp. School Dist., 405 F. 2d 1153 (8th Cir. 1969), Cert. denied, 396 U.S. 843 (1969)
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There is also conflict between the Seventh and Fourth Circuits, see *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md. 1965), aff'd per Curiam, 348 F. 2d 464 (4th Cir. 1965); Cert. den., 382 U.S. 1030 (1966)

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IN THE

Supreme Court of the United States

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Supreme Court, U.S.
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No. 71-162

DAVID E. ROTH,

Respondent,

vs.

BOARD OF REGENTS OF STATE COLLEGES, ET AL.,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-162.

DAVID E. ROTH,

Respondent,

vs.

BOARD OF REGENTS OF STATE COLLEGES, ET AL.,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Now comes the American Federation of Teachers by its General Counsel, John Ligtenberg, and petitions the Court for leave to file a brief as *amicus curiae* in the above captioned cause and in support thereof states as follows:

1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of approximately 1,000 locals located throughout the United States with more than 250,000 members. Of the 1,000 locals approximately 200 are local unions at the college and university level.

2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United States concerning dismissals of teachers. Many of these cases have been filed in United States District Courts under Section 1983 of the Civil Rights Act, and others are being considered. The American Federation of Teachers has traditionally provided financial assistance for the defense of members whose employment is terminated.

3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court in the case at bar will have a substantial effect upon the rights of its members, and may well have decisive effect upon many of these cases.

4. A request has been made of the attorneys representing the appellant and appellee seeking their consent to the filing of a brief *amicus curiae* by the American Federation of Teachers.

WHEREFORE, petitioner asks leave that its brief *amicus curiae* may be filed with this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-162.

DAVID E. ROTH,

Respondent,

vs.

BOARD OF REGENTS OF STATE COLLEGES, ET AL.,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

AMICUS CURIAE BRIEF.

I.

PUBLIC COLLEGE TEACHERS ARE ENTITLED TO A HEARING WHEN TERMINATED.

The question for decision is whether a State university which refuses to continue a teacher in his employment without affording him the opportunity for an evidentiary hearing prior to termination denies the teacher procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

In recent analogous cases this Court has ruled that termination of government benefits or privileges does require an evidentiary hearing. This was true in the case of termination of benefits to welfare recipients, *Goldberg* v.

Kelly, 397 U. S. 254 (1970) and revocation of driver's license, *Bell* v. *Burson*, 402 U. S. 535 (1971).

In those cases this Court weighed the impact of the withdrawal of benefits on the individual against the substantive and administrative needs of the government. Applying the same standards to the case at bar it is apparent that a college teacher is entitled to a hearing before his employment is terminated.

Several considerations support this conclusion. Initially, the college teacher like the lawyer or doctor, makes a substantial investment both in terms of money and time in preparing for his professional career. When a teacher seeks employment, his credentials are subject to considerable scrutiny. He simply does not walk off the street and begin teaching. Hence there is an initial recognition by university officials that the teacher is sufficiently competent to be given classes for a year or more. The relationship is a serious matter and not idly established by officials or employee.

The effect of termination of employment is profound. Not only are the teacher's professional reputation and future employment possibilities substantially impaired, but the teacher must pull up roots, disassociate himself from colleagues and neighbors and move to another locale to pursue his career.

Balanced against the impact on the teacher, the substantive and administrative needs of the university are miniscule. If non-renewal is warranted it should not be unduly difficult for presumably well educated officials to specify the reasons for their decision.

Requiring college officials to support their decisions with facts should be no burden. To the extent that it is a burden it is so because college officials too often have escaped the responsibility for justifying their decisions and

have lapsed into decision making without really having reasons for decisions. This, of course, is at the root of the current issue before this court.

Traditionally, colleges have four or more levels of influence. A Department Chairman makes a recommendation to a Dean, the Dean makes a recommendation to the President and the President makes a recommendation to the Board. Special advisory committees at the various levels are likely to be also involved in the process.

When efforts are made by a teacher to find out why he is being terminated he is confronted with lower ranking administrators who claim they only have power to recommend and higher ranking administrators who disclaim responsibility because they only were "relying on the recommendations" of those at the lower levels. In a very real sense the teacher is confronted with a "non-decision."

Moreover, when the reasons for termination are finally smoked out they are often couched in language intended to disguise rather than to communicate. Hence, "Mr. Smith's professional training and service are not compatible with the goals of the Department" has a pleasant ring but says nothing.

Having to conduct business in an orderly and understandable manner may be considered a burden on college officials unused to such practices. However, it should be considered a benefit and not a reason for denying scrutiny through the process of a hearing. This Court touched on the difficulties administrative agencies have in reaching correct decisions in *Goldberg* v. *Kelly*, 397 U. S. 266. This court concluded that not only would the due process rights of welfare recipients be protected but in so doing it was likely that the Welfare Agency might be better run.

Whether or not the possibility of a hearing would improve the administration of colleges and universities, it is

clear that allowing teachers a hearing imposes no real burden on school officials.

II.

THE RIGHT OF TEACHERS TO A HEARING IS PARTICULARLY PROPER BECAUSE TEACHERS NEED PROTECTION IN THE EXERCISE OF "ACADEMIC FREEDOM" AND THE EXERCISE OF OTHER RIGHTS.

Whether citizens have been legitimately concerned that teachers might actually attempt to violently otherthrow the government or whether there has been a desire to simply maintain orthodoxy in the classroom, it is apparent that teachers, as a group, have been the subject of unfounded suspicions and restrictions which impinge on their constitutional rights.

Teachers have been fired for criticizing school officials. *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). They have been required to attest their loyalty. *Weiman* v. *Updegraff*, 344 U. S. 182 (1952); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); and *Connell* v. *Higgenbotham*, 403 U. S. 207 (1971).

These cases clearly establish that teachers have full constitutional rights. However, the recurrence of these cases demonstrate the need teachers have for protection in the exercise of their rights.

In *Shelton* v. *Tucker*, 364 U. S. 379, 387 (1960), this Court said the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." In *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) the Court said it would not fail to apply "the First Amendment's mandate in our educational sys-

tem where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." In *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 513 (1969), this Court said: ". . . we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."

Unless teachers are entitled to notice and a hearing there is a substantial danger that termination based upon clearly unconstitutional reasons such as the political associations of a teacher will go unchecked. Often a teacher is dismissed and everyone knows or believes that it was because of protected activities. A hearing will go far toward confirming or negating such beliefs or suspicions. Hence, not only is the individual teacher's interest protected but the general academic community is more likely to exercise rights with less fear of retaliation.

But even in cases where substantive constitutional rights are not effected the hearing may reveal that the government officials simply had no basis for their decision. Under these circumstances a state remedy may be available for redressing the arbitrary and capricious acts of government.

But whatever the results of a hearing it serves a number of interests including a teacher's right to due process.

III.

THE HEARING SHOULD BE CONDUCTED BEFORE AN IMPARTIAL TRIBUNAL.

One of the aspects of this and other Court of Appeals decisions with which this *amicus curiae* takes issue is the remanding of cases to school officials for the hearing.

Allowing school officials to have substantial control over the selection of a hearing panel may have the net result of providing judicial approval of the administrative paper shuffling described under point I.

The power to decide a controversy, even though later subject to judicial review, is far too important to entrust to one of the participants to a dispute. One of the functions of 42 U. S. C. 1983 is to provide a forum which is insulated from partisan or parochial influences. Unless additional safeguards are imposed by this Court, both the aims of 42 U. S. C. 1983 and the Constitution requirements of due process are in jeopardy.

Whether proceedings are before an administrative agency or a court, litigants are entitled to a hearing before a fair and impartial trier of the facts. This Court has so held on numerous occasions: *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1959); *Morgan* v. *United States*, 304 U. S. 1 (1938); and *Commonwealth Coatings Corporation* v. *Continental Casualty Co.*, 393 U. S. 145 (1968).

The last cited case stated the rule rather simply

> ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Nor would such a safeguard impinge on the prerogatives of school authorities. The long experience under the N. L. R. A. adequately demonstrates that management discretion can be and is protected. If school administrators, who by their status, possess obvious advantages over teachers when testifying, are fearful of submitting the justification for termination of employment to a truly impartial tribunal then such decisions are suspect.

Probably the greatest single source of difficulty in present day tenure dismissal cases (aside from the cost) is

that boards of education sit as tribunals to decide whether to dismiss a teacher that they have already decided to dismiss. The outcome is predictable with 99% accuracy. The net effect is that each side merely attempts to make a record. In fact, success can be better obtained on review by the teacher if the board was patently unfair.

We, therefore, urge this Court to require that hearings be conducted by genuinely impartial tribunals.

IV.

THE INSTANT PLAINTIFF AND OTHER TEACHERS TERMINATED WITHOUT A HEARING SHOULD BE AUTOMATICALLY REINSTATED.

The teacher who fails to make timely demand for a hearing or otherwise fails to follow procedures is foreclosed from maintaining an action against the educational institution. This is true under tenure laws, civil service statutes and administrative regulations.

Where, as here, officials have failed to provide a hearing required by due process they should not be given a second chance to make their case.

This court has in the past refused to go to the merits where there has been violation of procedural rights but has simply reversed. *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959); *Greene* v. *United States,* 376 U. S. 149 (1964); *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963).

Nor does there appear to be any need for an exception to this principle. If a teacher is manifestly bad, then there should be no difficulty in justifying the termination in the first instance.

We suggest that the Court reaffirm the established principle that where an administrative agency has failed to follow constitutional procedures it should not be allowed to reopen the case.

CONCLUSION.

The American Federation of Teachers supports the position that if college teachers are terminated they are entitled to a hearing and when denied a hearing they are entitled to automatic reinstatement.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES and ROGER E. GUILES,
Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of the Board of Trustees of the California State Colleges as Amicus Curiae

I.

INTEREST OF THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE COLLEGES.

The Board of Trustees of the California State Colleges is the governing body for a statewide system consisting of nineteen separate campuses serving a total of approximately 263,000 students and employing a faculty of approximately 14,900.[1] Pursuant to legislative authorization

1. Including 3,700 part-time instructors.

the Board has adopted rules and regulations for the hiring, retention, and tenure of academic employees. The principles embodied in these rules have deep roots in academic tradition and experience, and, being of common or related origin with the tenure systems of most other public institutions of higher education in the United States, the principles followed in California are very similar to those which are in issue in this case. A decision by this Court affirming the holding of the Court of Appeals would have a direct, substantial, and immediate effect upon the California State Colleges in that it would require a complete revision of the rules and policies governing hiring, retention and tenure. The extent of the potential impact of the decision is perhaps best illustrated by the fact that 534 non-tenured faculty members in the California State Colleges were given notices of nonretention for the current academic year and thus are in a position to assert whatever rights the Court holds may be asserted by the respondent here.

II.

IMPORTANT VALUES ARE PUT IN JEOPARDY BY THE CIRCUIT COURT'S DECISION.

Important values which are put in jeopardy by the Circuit Court's decision are the following:

(1) A college or university should have the maximum flexibility and maximum freedom to hire new faculty on a fully probationary basis without making any long term commitment to the probationer.

(2) Tenure should be accorded only to an individual who has earned it by demonstrating not only that he is qualified scholastically and academically, but also that he is the best prospect available—i.e., that he has more potential for academic excellence than any other candidate or potential candidate.

(3) The obligation of the institution to provide its students, present and future, with the best instruction possible is paramount to the interest of the individual faculty member in retaining a specific position.

The decision of the Circuit Court, by imposing upon public colleges and universities a requirement that probationary employees be retained or given a statement of reasons for nonretention and an administrative hearing, will have the following detrimental results to the quality of public higher education:

(a) Employers will become more cautious and less likely to hire persons with innovative or unconventional ideas.

(b) Administrators will be required to assume the unfamiliar and unwelcome burden of documenting and justifying the often subtle and subjective judgments which go into retention and tenure decisions. The result will be that retention and tenure will be granted by default to individuals who have not in fact proved themselves deserving of it.

(c) The overall quality of instruction will suffer because appointments will be made according to criteria which place the individual faculty member's personal interests above the interests of the institution and its students.

III.

THE RULE OF CAFETERIA WORKERS v. McELROY CALLS FOR A BALANCING OF THE PUBLIC INTEREST IN MAINTAINING THE QUALITY OF PUBLIC HIGHER EDUCATION AGAINST THE INTEREST OF THE EMPLOYEE IN RETAINING A SPECIFIC JOB.

To determine what procedural protections, if any, are required when a college or university decides not to rehire a non-tenured teacher, it is necessary to weigh the interests of the institution against those of the employee. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886

(1961). As the Court pointed out in *McElroy*, there is no universally applicable constitutional requirement of notice and hearing in every instance where the interests of an individual may be impaired by governmental action: ". . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 367 U.S. at p. 895. See also *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

The competing interests to be balanced in the present case are, on the one hand, that of the public in providing the best possible education to the students, both present and future, of public colleges and universities, and on the other, the interest of the individual teacher in retaining his position with the institution.

The discussion which follows will analyze each of these competing interests in turn, and will demonstrate that the decision of the Court of Appeals strikes the balance improperly by giving insufficient weight to the important public interests which are at stake.

IV.

THE TRADITIONAL APPROACH TO TENURE IS ESSENTIAL TO PRESERVE THE QUALITY OF HIGHER EDUCATION.

A. The Public Interest Is Paramount.

Public higher education exists for the students and for the general welfare of society at large, not for the faculty or for the benefit of the individual faculty member. A decision to award tenure necessarily involves a long term commitment on the part of the institution—a commitment which will directly affect the education of thousands of students and will involve the expenditure of hundreds of thousands of dollars. It is essential, therefore, that all such decisions be made with the utmost care to insure that the public interest in maintaining the quality of education is adequately protected.

B. The Distinction Between Probationary and Permanent Employment Is Important and Must Be Preserved.

Faculty members are appointed on a yearly basis and are subject to continual reevaluation until tenure is attained. Tenure, or permanent status, is gained after a probationer has served for a specified number of years, which varies from institution to institution but usually does not exceed seven years. After he has obtained tenure, the faculty member cannot be terminated except for cause and after a hearing.

Essential to the tenure system is the time honored concept that a probationary employee must prove himself by his performance. He is entitled to no presumption of competence, and until tenure is granted the college assumes no burden of establishing cause for termination of the employment relationship. Also according to the traditional principles, the college remains free during the employee's probationary period to search for better qualified personnel. Even if the probationer's performance is entirely adequate, the college remains obligated to hire teachers who appear to have greater potential, if they are available. Only the probationer who proves himself equal or superior to the competition deserves to be awarded the valuable rights and privileges which tenure confers.

The principles of the tenure system, as described above, have been developed over the years through participation by faculty and administrators. They represent what has been found through experience to be best suited to the academic community and best for maintaining the quality of higher education. Moreover, the tenure system itself provides substantial protection from arbitrary action, a feature which was completely overlooked in the decisions of the District Court and the Court of Appeals in this case.

C. The Probationary Process Contains Built-in Protection Against Arbitrary Action.

The process for determining whether to reappoint a probationary faculty member, or to award him tenure, begins with recommendations from the faculty member's colleagues in his department and proceeds through the department chairman and various administrators and college committees, the practice varying somewhat among institutions. Normally, the recommendations from each level are received by the president or the governing board who make the ultimate decision upon the basis of the reports and recommendations which are received from all levels of the college. This process is typical in institutions of public higher education throughout the United States and by its very nature contains built-in checks and balances against unfair treatment. The protection thus provided is real and substantial. The multi-faceted nature of the process serves as a check against arbitrary action by any one individual since his recommendation is only one among many, and because each recommendation is subject to scrutiny at other levels.

In addition, many institutions provide further appeals of a formal or informal nature. In some colleges, procedures are available for the faculty member to meet with the committees or administrators who have made negative recommendations in order to attempt to convince them to change their recommendations. In the present case, the faculty member had the right to appeal to the Board of Regents, although he chose not to take advantage of the opportunity.

D. A Requirement That a Probationary Faculty Member Be Given a Statement of Reasons and a Hearing Is Incompatible with the Tenure Concept.

The tenure system is founded upon the rule that until a person obtains tenure no reason need be given for the

decision not to retain him, and after he has tenure he may be dismissed only for "cause" and after a hearing. The Circuit Court decision presently under review undermines this principle by requiring the institution to produce a statement of the reasons for nonretention and to provide a hearing at which the validity of those reasons may be tested.

Both the District Court and the Court of Appeals attempted to preserve the distinction between probationary and tenured faculty by stating that the "cause" traditionally required for dismissal of a tenured faculty member is not required for the decision not to retain a probationary faculty member. Instead, the opinions state that a "considerably less severe" standard is to be applied. *Roth v. Board of Regents*, 446 F.2d 806 at p. 808 (7 Cir. 1971); 310 F.Supp. 972 at p. 979 (W. D. Wisc, 1970).)

The distinction which the lower courts thus attempt to draw between "cause" and something less than "cause" will prove unworkable in practice. As a result, "cause" inevitably will become the standard for nonretention of probationary faculty. The reasons for this are several. Although presumably the customary "subtle" bases for nonretention would still be legally acceptable (*Roth v. Board of Regents*, 446 F.2d 806 at p. 809 (7 Cir. 1971)), the court's holding gives insufficient weight to the practical difficulty of producing a written statement verbalizing these considerations. Such "subtle" reasons are in fact difficult to put into a written charge, because they depend so much on subjective evaluation of such matters as the probationer's rapport with his colleagues and students, his creativity, diplomacy, his mastery of his field of study, and other intangible qualities. See *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1184 (1 Cir. 1970), *cert. denied* 91 S.Ct. 1659 (1971); *Developments in the*

Law—Academic Freedom, 81 HARV. L. REV. 1045, 1101 (1968).

The natural tendency, then, will be to avoid the troublesome task of articulating subtle and subjective reasons and to search for objective factors which are more easily described—factors such as those which might constitute "cause" for dismissal of a permanent employee. When no objective cause can be found, the tendency will be to withhold adverse comment entirely and recommend in favor of retention.

In addition, faculty members who evaluate probationers are not administrators and generally will not have the administrative skills required to make proper written reports of their evaluations of probationary employees. The knowledge that he will later be called upon to defend his reasons at a hearing predictably will have a chilling effect on the individual making the evaluation, and will lead him to shun making negative recommendations except where the probationer has done something patently and objectively wrong.

Once the institution is required to give a statement of reasons, the inevitable tendency will be to look to the institution to support those reasons and carry the burden of proving them. In addition, the confusion caused by having two similar but subtly different sets of rules and procedures, one for probationary and one for tenured employees, is likely to lead to misunderstandings and administrative difficulties. The tendency will be to avoid application of two different criteria and administration of two different standards and procedures, and to treat all employees in a similar manner.

For the above reasons, the distinction between tenured and probationary faculty is likely to be obliterated, and ultimately "cause" will be required for nonretention as

well as dismissal. The effect will be to eliminate the probationary process and the important benefits which historically have been derived from its maintenance. See *Freeman v. Gould Spec. School Dist.*, 405 F.2d 1153, 1160 (8 Cir. 1969), *cert. denied* 396 U.S. 843 (1969).

Requiring a statement of reasons and a hearing will not only cause reluctance to make negative decisions once the person is employed, it also will tend to inhibit the employment of persons of unusual or non-conforming background. The administrator who knows that it will be difficult to terminate a professor once he is employed will not be inclined to take a chance on someone who does not conform to accepted standards, whether by reason of academic training, personality, or philosophy. Inevitably, these two natural and predictable forces will combine to produce a homogeneous faculty composed of individuals who have received tenure not because they have proved themselves to be superior scholars and teachers, but because the institution was unable, or unwilling, to prove they were not. *Drown v. Portsmouth School Dist.*, 435 F.2d 1182, 1186 (1 Cir. 1970), *cert. denied* 91 S.Ct. 1659 (1971).

The tradition of faculty participation in decision making creates additional obstacles to the preparation of written statements of reasons for nonretention. As discussed earlier, the decision not to reappoint is not normally made by one person, but is the result of a consensus, including evaluations by departmental colleagues, the department chairman, and other groups and individuals in the college. It is rare, therefore, that there is only one reason for nonretention. Each person making an evaluation may have a different reason, and one or all may not be willing to subscribe to the other's report. Meetings and conferences frequently will be required in order to attempt to

reach agreement upon the content and wording of a written statement, and this added burden will have a further tendency to inhibit the making of negative recommendations in difficult cases.

E. The Requirement of a Hearing Will Impose a Heavy and Unnecessary Burden Upon the Institution.

It is common knowledge that educational institutions everywhere are operating under severe financial restrictions. Any added administrative burden, such as the hearing requirement imposed by the Circuit Court's decision, will necessarily reduce the amount of resources available for the primary function of the institution—that of educating its students.

In addition, the requirement of a hearing could result in removing the decision making process from the faculty and college administrators to professional hearing officers. If a hearing is required by law, many probationers will wish to be represented by an attorney at the hearing. If this is permitted, it will be necessary for the institution also to employ an attorney to represent its interests. In this adversary context, the institution will be obligated to provide a legally trained hearing officer to hear the case, because lay persons, whether faculty or the governing board, ordinarily do not have the skills required to conduct a hearing where both parties are represented by counsel. *See, e.g., Fluker v. Alabama State Board of Educ.*, 441 F.2d 201, 203 (5 Cir. 1971), where a faculty committee declared itself unable to resolve issues raised by the attorneys representing the parties at the hearing.

There is reason to doubt that the administrative hearing required by the court below would be of any real value or benefit. As observed by Judge Duffy in his dissenting opinion, college hearing committees are not qualified to

pass upon questions of law (446 F.2d at p. 811). The probationer who is not successful at the college hearing, moreover, will insist upon receiving a de novo hearing in the courts, while the college will be bound by what it has done at the administrative level.

Academic values obviously will suffer if retention and tenure decisions are made by persons who do not have academic expertise. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5 Cir. 1970). The only satisfactory solution is to permit the colleges to continue to perform the function of determining academic and scholastic qualifications without imposing upon them the burden of an administrative hearing. This solution is not incompatible with the established rule that the employee who feels he has been subjected to punitive action for his exercise of constitutionally protected rights may seek to establish his claim in the courts.

V.

THE INTEREST OF THE PROBATIONER DOES NOT MERIT THE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS.

As demonstrated above, the interests of the institution, and the public, in continuing the present system are substantial. The lower court, however, considered the interest of the probationer more weighty. The court equated nonreappointment with refusal to grant a license to practice a profession (at p. 809), and concluded that the two situations call for similar due process protections. The court's conclusion, it is submitted, is not valid. The effect of nonretention on the individual's career is not as severe as the court suggested. He is not prevented from pursuing his career, as in the case of a failure to obtain a license. He is only foreclosed from one particular job. Secondly, he has not been fired for "cause", and nonretention does not imply that the faculty member has been found guilty

of misconduct or that his performance has been unsatisfactory.

In the administration of a college or university, it is frequently necessary to make personnel changes in order to achieve a better balance in the teaching staff of an academic department. Such changes may, and often do, require that notices of nonretention be given to non-tenured professors. Because such occurrences are common, it is understood among college administrators that nonretention by another institution does not imply unsatisfactory performance, and the fact that an applicant has not attained tenure elsewhere is no barrier to obtaining new employment.

It also is important to note that the faculty member is given notice of nonretention many months prior to the date the decision becomes effective. He thus has ample time to search for other employment.

The requirement of giving written reasons for the decision not to retain may have the very result that the lower court wished to avoid. If written reasons are required for nonretention in every case, these reasons may reflect adversely upon the probationer and their availability to other employers may make it difficult for him to obtain another position.

VI.

THE LOWER COURT DECISION IS CONTRARY TO CASE LAW.

The Circuit Court decision represents a departure from accepted principles of law which have been prescribed by this Court. In *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), the Court held that due process was not denied when an employee lost her job because she was summarily denied access to a government site on which she worked. The Court stated:

> "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." (361 U.S. at 896).

The Court added that as far as the Constitution was concerned a public employee may be summarily discharged "at any time without giving the reason." (at 897). See also *Bailey v. Richardson*, 182 F.2d 46 at p. 57 (D. C. Cir. 1950) *affirmed* 341 U.S. 918 (1950).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court cited *Cafeteria and Restaurant Workers Union v. McElroy, supra*, with approval. The Court held in *Goldberg* that an evidentiary hearing is required prior to termination of welfare payments but specifically distinguished the termination of welfare from "the discharged government employee." (397 U.S. at p. 264).

The long accepted rule that probationary employment may be terminated for any reason and without a hearing, except that it may not be terminated for the exercise of constitutionally protected rights, has been followed by the federal and state courts in numerous cases which are discussed by counsel for petitioners. Amicus curiae wish, however, to bring to the Court's attention the recent decision of the California Supreme Court in *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537 (1971). *Bogacki* involved a permanent county employee who claimed that he could not be discharged without "cause" and without a hearing. The California Supreme Court rejected this claim, stating:

> "A public employee serving at the pleasure of the appointing authority—whether he be a "permanent" employee in a non-civil-service county as in this case, a "provisional" employee in a civil service county [citation], or any other kind of public employee serv-

> ing on this basis—is by the terms of his employment subject to removal without judicially cognizable good cause. "Unquestionably, a broad discretion reposes in governmental agencies to determine which [such] employees they will retain. Considerations of comity and administrative efficiency counsel the courts to refrain from any attempt to substitute their own judgment for that of the responsible officials." (At p. 783)

Many of the cases which have been cited in support of the position of the respondent are not concerned with the rights of government employees, and therefore are not helpful in the consideration of this case. Those cases cited which do pertain to governmental employment are distinguishable, either because they involve a substantive determination that the employer unlawfully required the employee to waive constitutional rights as a condition of continued employment (*e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952)), or because the government interest involved was so slight that it was entitled to no significant weight (*e.g., Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969)).

CONCLUSION

The decision in this matter by the Court of Appeals for the Seventh Circuit gives insufficient attention to two important considerations: (1) the public interest in maintaining the existing tenure system in order to protect the quality of public higher education, and (2) the fact that the probationary process is designed to afford the non-tenured teacher substantial protection against arbitrary treatment. Considering these factors, and balancing the competing interests of the public against those of the individual employee, it is respectfully submitted the Court should reverse the decision of the Court of Appeals and remand the case for further proceedings in the trial court as may be appropriate.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE WISCONSIN BOARD OF REGENTS OF STATE COLLEGES AND ROBERT E. GUILES,
PETITIONERS

v.

DAVID F. ROTH, FOR HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, *AMICUS CURIAE*

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BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, *AMICUS CURIAE*

Interest of the *Amicus*

The Commonwealth of Massachusetts maintains numerous public institutions of higher education[1] employing

[1] These are the University of Massachusetts with campuses at Amherst, Boston and Worcester, eleven State Colleges in all parts of the Commonwealth, Southeastern Massachusetts University, Lowell Technological Institute, and various Community Colleges throughout the Commonwealth.

hundreds of teaching personnel, both tenured and non-tenured. Recently, considerable litigation has arisen in the United States District Court for the District of Massachusetts involving both the procedural and substantive constitutional rights of non-tenured teachers at public institutions who have been denied renewal of their employment contracts. The central issues raised in the present case have been raised in such litigation. The United States Court of Appeals for the First Circuit, in a case arising in New Hampshire [2], has reached a result different from that reached by the Seventh Circuit in the present case, and indeed different from the result reached in any of the other Circuits which have considered these issues. The Commonwealth has a substantial interest in the resolution of the conflict among the Circuits on this issue, and in a full and final delineation of the rights and obligations both of State educational institutions and of non-tenured faculty. The Commonwealth likewise has an interest in a solution which, while protecting the rights of individuals, does not place a constitutionally unnecessary administrative burden on public educational institutions, thereby inhibiting their exercise of a sound discretion in crucial areas of academic policy and decision-making.

Argument

I. THE BURDEN OF DEMONSTRATING THAT THE REASONS FOR HIS NON-RETENTION ARE CONSTITUTIONALLY IMPERMISSIBLE RESTS UPON A NON-TENURED OR PROBATIONARY TEACHER AND HE IS NOT ENTITLED TO A STATEMENT OF REASONS OR A HEARING.

[2] *Drown* v. *Portsmouth School District*, 435 F. 2d 1183 (1970), *cert. denied*, 402 U. S. 972 and *Drown* v. *Portsmouth School District, et al.*, Docket Number 71-1247, decided December 1, 1971. See also *McEnteggart* v. *Cataldo, et al.*, Docket Number 71-1254, decided December 1, 1971.

Where a non-tenured teacher in a public institution is denied re-employment because of the exercise of First Amendment or other Constitutional rights, or on account of race or other impermissible discriminatory criteria, his right of action under 42 U. S. C. § 1983 would appear to be firmly established. *Slochower* v. *Board of Higher Education of New York City*, 350 U. S. 551; *Johnson* v. *Branch*, 364 F. 2d 177 (C.A. 4, *en banc*, 1966), *cert. denied*, 385 U. S. 1003 *Freeman* v. *Gould Special School District of Lincoln County, Arkansas*, 405 F. 2d 1153 (C.A. 8, 1969), *cert. denied*, 396 U. S. 843. The Court is here faced, however, with the question of the procedural due process rights to be afforded a non-retained, non-tenured teacher in the absence (in the present posture of the case) of any allegation that the decision not to rehire was based upon Constitutionally impermissible reasons. The United States Court of Appeals for the Seventh Circuit has held, in affirming the judgment of the United States District Court for the Western District of Wisconsin, that the respondent here was "entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond." *Roth* v. *Board of Regents of State Colleges, et al.*, 446 F. 2d 806, (C.A. 7, 1970). The Commonwealth of Massachusetts submits that this holding unfairly shifts the burden of establishing the Constitutional sufficiency of the decision not to rehire the respondent onto the petitioners. If upheld, such a requirement will destroy the patiently-developed system by which probationary teachers are evaluated, advanced or released in Wisconsin, in Massachusetts, and throughout the nation, to the ultimate detriment of the teaching profession and to the great damage of public education.

In the present case, the respondent alleged "that the reason for petitioners' decision not to retain him for the

school year '69-'70 was to retaliate for [his] constitutionally protected expression of opinion. . . ." 446 F. 2d at 808. The *Amicus* would join with the petitioners here in contending that such a proposition is for the respondent to prove "in the branch of this case which is not now before us." *Ibid.* This is so not only because "government employment, in the absence of legislation, can be revoked at the will of the appointing officer," *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896, but also because the Court of Appeals' "acceptance of [the] format of argument has resulted in the unnecessary decision of a constitutional question. . ." *Roth, supra*, 446 F. 2d 806 at 814 (Duffy, J., dissenting). In addition, to shift the burden from the non-tenured employee to the employing institution would be an unwarranted and destructive intrusion into the delicate workings of the academic hiring and tenure system as it exists, with minor local variations, across the country.

The essence of the distinction between non-tenured or probationary employment status and academic tenure is in the discretion exercised by educational institutions in evaluating probationary teachers on subtle and varied bases often incapable of precise articulation. This the District Court in the present case appears to have conceded, stating that "it is reasonable that there be available a wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer." *Roth* v. *Board of Regents*, 310 F. Supp. 972, 978 (W. D. Wisc. 1970). The relationship of an institution to its non-tenured faculty is an experimental one, a trial period for both parties. "It certainly implies no commitment for continuance of employment, if for any reason the experimental relationship leads to the conclusion that a more extended relationship may be unsatisfactory." *Rhine* v. *International Young Men's Christian Association College*,

339 Mass. 610, at 613 (1959). Such a conclusion may be reached for a variety of reasons. The teacher may be unobjectionable, but others may be preferred for the limited positions available. Evaluating personnel may differ in their reasons for desiring not to retain him, thus making an agreement on the "reason" impracticable. A teacher may be personally objectionable to individual colleagues, making his continued presence a divisive influence in an academic department. Cf., *McEnteggart* v. *Cataldo, et al.*, Docket Number 71-1254 (C.A. 1, decided December 1, 1971). To require, as the decision of the Court of Appeals in effect does,

> . . ."that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any re-employment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants." *Sindermann* v. *Perry*, 430 F. 2d 939, 944 (C.A. 5, 1970), *cert. granted*, 403 U. S. 917.

To require a statement of reasons and an administrative hearing even in the absence of allegations of substantive Constitutional infringement would cripple the functioning of the non-tenured or probationary employment relationship. Academic personnel would be caught up in constant administrative detail. The necessity of articulating "bases for non-retention enjoying minimal factual support and. . .supported by subtle reasons," *Roth, supra*, 310 F. 2d at 979, and of sustaining them in a trial-type hearing would be a strong detriment to the exercise

of that judicious discretion which is the cornerstone of the evaluative process. The tendency, inevitably, would be to retain mediocre or objectionable non-tenured faculty rather than incur the procedural burden of sustaining a decision not to rehire. The appointment of the freshest and most untried junior faculty member at a public institution would immediately harden into a permanent relationship severable only at the cost of potentially divisive and acrimonious quasi-judicial proceedings. The implications for the continued upgrading of the nation's public college facilities would be, at the least, unfavorable.

The Court is not here asked to weigh the interest of the probationary teacher in being free of unconstitutional exclusion from public employment. That interest is already amply protected by the availability of that remedy which this respondent has pursued in the as yet unlitigated facet of the present case. What the Court is asked to do, however, is to extend to all such teachers the benefits of indefinite tenure, terminable only for cause. Such a wholesale creation of substantial new rights with regard to public employment cannot be fitted under the umbrella of the due process clause.

II. In The Alternative, Providing The Respondent With A List Of Reasons For The Decision Not To Rehire Him Is A Sufficient Safeguard Of His Constitutional Rights, And The Further Requirement Of A Hearing Is Of Illusory Benefit To Him And Of Great Potential Harm To Public Education.

In the alternatives, the *Amicus* submits that the issue presented by the instant case may be resolved on a basis other than that suggested either by the petitioners or the respondent in the Court of Appeals. The constitutional interests of the respondent and the administrative exigen-

cies of the petitioners might at once be preserved by requiring that the respondent be given the reasons for his non-retention without providing him with an administrative hearing. The respondent might then know the basis for the decision not to rehire him, and, if the reasons were constitutionally impermissible, or palpably insubstantial, or if he determined that the reasons given were false and not the real reasons, he would be aided in any attempt, under 42 U. S. C. § 1983 or otherwise, to demonstrate their insufficiency. At the same time, the burden of proving such insufficiency would rest with the respondent, and the petitioners (and public educational administrators throughout the country) would not be faced with the prospect of holding a quasi-judicial hearing each and every time they wished to sever a relationship with a non-tenured faculty member.

This approach has been taken by the United States Court of Appeals for the First Circuit in the case of *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1970), *cert. denied*, 402 U. S. 972. In that case a public high school teacher without tenure was given timely notice of the school district's decision not to rehire her for the following year. She sought a list of reasons for this decision and a hearing in which to challenge them, and, when these were denied, she commenced an action in the United States District Court under 42 U. S. C. § 1983. As in the present posture of the instant case, no claim was there raised of the violation of any of her collateral constitutional rights.

The Court of Appeals weighed, first, the competing interests of the teacher and the school district in letting the teacher know the basis of the decision. The court reasoned that notice to the teacher would give her the opportunity informally to correct factual mistakes, to develop evidence of a constitutionally impermissible basis for the decision, or, if the reasons given were not the true rea-

sons, to demonstrate that falsity and thus develop the fact that the reasons lay elsewhere and were improper. Against this interest, the court assessed the administrative inconvenience to the school board. It concluded that since periodic evaluations are in any event a widespread practice, and that in some states reasons of the type sought are statutorily required, the administrative burden would be minimal. The Court therefore held,

> ". . .that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantage for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention together with access to evaluation reports in the teacher's personnel file," 435 F. 2d at 1185.

The court went on to consider the plaintiff's request for a hearing and concluded that to grant one would be an unwarranted burden on the school board and of limited value to the teacher. The Court first noted that any hearing, to be meaningful, "would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board." *Ibid.* While the precise nature of the hearing ordered in the instant case is unclear from the court of appeals' decision, if it is not to be a sham it must presumably include some or all of the procedural safeguards listed above. The court in *Drown* went on to note the inhibiting effect that requiring such a proceeding would have on the willingness of school boards to let a mediocre teacher go or, indeed, to hire any but the blandest and most innocuous candidates in the first place. "Such risks and burdens," the Court felt, "might be tolerable if the right to a hearing gave promise of

high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher." 435 F. 2d at 1186. On inquiry, however, the court concluded that such a hearing would not have that effect:

> "One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions. . . . A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.
>
> "There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protecting himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. . . . From the teacher's point of view, there is little reason for him to prefer the prospect of two full-scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are avail-

> able, or, if not of this magnitude, it may be subject to a state court remedy in tort. .... Moreover, an absolute safeguard against the possibility of covert bad faith would involve school boards delegating crucial rehiring decisions to third parties—a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures." 435 F. 2d at 1186-1187.

In the present case, the district court made it clear that in the hearing which it mandated, the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." 310 F. Supp. at 979. This language is cited with apparent approval by the court of appeals, 446 F. 2d at 808. It is difficult to imagine how such a hearing would be a meaningful safeguard for the teacher, or how, practically, the administrators of a public institution could conduct one according to such a standard. A tenured professor is normally one who has weathered a probationary period and has passed muster with colleagues and employers alike. The reasons for a person's acceptance may be incapable of articulation. But, he may thereafter be dismissed, generally, only after hearing and for "cause"—that is, for a failure to live up to comparatively well-defined and minimal requirements of competency and professional conduct. Whether he suits or pleases the faculty or administration in every vague particular is no longer at issue; specific violations of his manifest obligations of professional and personal conduct are required if he is to be removed. On the other hand,

"... the college may base its decision not to re-employ a teacher without tenure or a contractual expectancy of re-employment upon any reason or upon no reason at all." *Sindermann* v. *Perry, supra*, 430 F. 2d 939 at 944. Such a teacher may not be denied re-employment for a constitutionally impermissible reason; but if he is given a list of reasons, and wishes to challenge them on constitutional grounds, the courts which are always open to him are a far more competent constitutional forum than an administrative hearing.

The court in *Drown, supra*, speculated that "bad faith may rise to a constitutional level." 435 F. 2d at 1187. Here, too, it felt that proper redress should be had in the courts. That such cases must be rare, and the burden of a teacher in overcoming the broad discretion of his employers heavy, may be seen from the subsequent history of the *Drown* case.

Pursuant to the court's first decision ("*Drown I*"), the plaintiff was given a list of the reasons for her non-renewal. These were that she had reported illness on a day that she attended a teachers' association meeting to which she was not a delegate; that while her classwork was satisfactory, her department reported her to be uncooperative and resistant to direction; and that she had refused to meet with an administrator regarding her personal situation. *Drown* v. *Portsmouth School District*, Docket Number 71-1247, page 2, decided December 1, 1971, ("*Drown II*"). The plaintiff attacked these reasons in the district court as arbitrary and capricious and in violation of the Fourteenth Amendment, and, upon dismissal of her claim there, appealed. "*Drown II*," *supra*, page 1.

The court of appeals recognized that "even the minimal interest of the non-tenured teacher in renewal of her contract cannot be taken away for reasons which are entirely arbitrary and capricious." The court went on to suggest

three ways in which a reason may be arbitrary and capricious: first, it "may be unrelated to the educational process or to working relationships within the educational institution;" second, it may be egregiously trivial; and, third, it may be "wholly unsupported by a basis in uncontested fact." *Drown II*, *supra*, p. 3. "To state a claim under 42 U.S.C. § 1983," the court continued, "a teacher must at least attack each of the stated reasons on one of the grounds indicated. . . ." *Ibid*, page 3. The court concluded that the plaintiff had failed to do so successfully and affirmed the judgment below. *Ibid*, pp. 4-5.

In what way would the plaintiff in *Drown* or any teacher similarly situated, have been aided by an administrative hearing? Since her right to a reversal of the decision not to rehire her would depend upon the presumed bad faith of her employers, a hearing before them would be a solemn farce. Cf. *Chase* v. *Fall Mountain Regional School District*, 330 F. Supp. 388, 395 (D. N.H. 1971).[3] Likewise, since differences of attitude and philosophy would lie within the discretion of the educational administration, the inability to persuade them to relent informally would insure the futility of an adjudicative proceeding. Finally, as has been noted above, the allegation of a substantive constitutional deprivation raises issues beyond administrative competence. The imposition of a requirement for a hearing would have little or no salutary effect, but would more likely result in the hardening of attitudes and the unnecessary generation of turmoil and acrimony. More importantly, it would be a grave deterrent to the exercise by educational authorities of that discretion and selectivity which the needs of public education demand.

Since reasons for non-retention usually do exist, to require that the reasons be stated may not be unduly burdensome. This is not to concede, however, that a statement of reasons is required by the Due Process Clause. To

[3] Defendants' appeal docketed with the First Circuit, November 23, 1971.

require a hearing, however, even in the absence of allegations of substantive constitutional violations, would be of illusory benefit to the individual employee and would only promote an unwholesome ossification of educational personnel through the length and breadth of the land.

Conclusion

The Commonwealth of Massachusetts respectfully urges that the decision of the court of appeals should be reversed, either *in toto* or at least with respect to the requirement of a hearing.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

THE BOARD OF REGENTS OF STATE COLLEGES and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

Brief Of The American Council On Education, The American Association Of State Colleges And Universities, The Association Of American Colleges, The National Association Of State Universities And Land-Grant Colleges, The Board Of Governors Of State Colleges And Universities Of Illinois, The Board Of Trustees Of The University Of Illinois, The Board Of Regents Of Regency Universities Of Illinois, And The Board Of Trustees Of Southern Illinois University, As Amici Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

Brief Of The American Council On Education, The American Association Of State Colleges And Universities, The Association Of American Colleges, The National Association Of State Universities And Land-Grant Colleges, The Board Of Governors Of State Colleges And Universities Of Illinois, The Board Of Trustees Of The University Of Illinois, The Board Of Regents Of Regency Universities Of Illinois, And The Board Of Trustees Of Southern Illinois University, As Amici Curiae.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are national associations whose members constitute almost all of the colleges and universities in the nation, public and private, and boards administering all public colleges and universities in Illinois:

The American Council on Education is the nation's largest association of colleges and universities. Its membership includes 1,343 institutions of higher education, 213 national and regional associations, and 83 affiliated institutions and organizations concerned with higher education in the United States.

The American Association of State Colleges and Universities has a membership of 288 state colleges and universities enrolling approximately two million students.

The Association of American Colleges has a membership of 893 colleges, which includes all private liberal arts colleges in the United States as well as several public liberal arts colleges.

The National Association of State Universities and Land-Grant Colleges has a membership of 114 public colleges and universities.

The public boards are the Board of Governors of State Colleges and Universities of Illinois, the Board of Trustees of the University of Illinois, the Board of Regents of Regency Universities of Illinois, and the Board of Trustees of Southern Illinois University.

The *amici curiae* have submitted this brief because they believe that the decision below, while intending to protect the academic freedom of probationary instructors, unwittingly threatens academic freedom and academic excellence.

The petitioners and respondent have consented to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Does the Constitution require a public college having a tenure system to give a statement of reasons and a hearing upon demand to every probationary college instructor whose teaching contract is not renewed beyond its expiration when no such right is provided by statute, regulation, contract or academic custom or practice, or rather should public colleges be left free from federal court intervention in fashioning changes in the tenure system?

STATEMENT OF THE CASE

The *amici curiae* rely on the statement of the case contained in the brief for the petitioners.

SUMMARY OF ARGUMENT

A public college cannot refuse to renew a probationary instructor's contract in violation of his First Amendment or other substantive constitutional rights. Concern for the protection of substantive constitutional rights prompted the courts below to require public colleges to afford a hearing with prior notice upon request to any probationary instructor whose teaching contract is not renewed.

The tenure system, which has evolved over several decades and exists at almost all public colleges, has included a probationary or testing period during which the contract of a probationary instructor has customarily been permitted to expire without a hearing and notice of reasons. The decision below endangers the interdependent objectives of the tenure system: academic excellence and academic freedom.

The hearing conceived by the courts below would be ineffective in protecting substantive constitutional rights. Whether or not effective, a hearing would burden college faculty and administrators and would interfere with their duty to strive for quality education. Any hearing which is effective would obliterate the distinction between tenured and probationary faculty. The ultimate effect of providing the hearing may well be to diminish the significance of the award of tenure, to the detriment of academic freedom.

This Court has stated that the Constitution "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961). The courts below recognized the need in cases such as the present one to balance the public and private interests involved. The courts struck an improper balance.

The courts below sought to substitute their judgment for that of legislatures, governing boards and college administrators and faculty bodies across this nation to provide an unprecedented modification of the tenure system. This exercise in constitutional fiat lacks the benefit of years of trial and experience that went into the evolution of the present tenure system. In view of the central position of higher education in the scheme of our fundamental liberties of thought, inquiry and expression, it was error, and an insidious danger surely not contemplated by the courts below, so to exercise jurisdiction in the absence of a clear constitutional mandate.

ARGUMENT

Introduction

This case presents two questions of paramount importance to public higher education. The immediate question is whether the Constitution requires abandonment of the long-established practice that the decision not to retain a probationary faculty member need not be accompanied by a formal statement of reasons and a hearing. The other, and perhaps more worrisome, question is whether in the absence of clear constitutional violations federal courts should become involved in setting policy for the day-to-day conduct of affairs of public colleges and universities.*

One may think it ironical that in the view of the *amici curiae* a decision attempting to frame means for protecting First Amendment rights of college instructors would be seen as posing a threat to academic freedom.

The importance of academic freedom cannot be disputed. Colleges in this country cannot properly function unless they are havens of unfettered discussion. Free discussion and quality education are not mutually exclusive. Integral to quality education is the free presentation of competing ideas and controversial viewpoints. Quality education, in turn, invigorates public debate. Furthermore, colleges should provide a refuge where new concepts can be discussed and developed free from the social constraints which often inhibit discussion in the world of business and government.

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*As used hereinafter, the term "college" includes both colleges and universities.

To protect free discussion and quality education, a system of tenure has evolved over several decades. The *amici curiae* believe that the decision below is a serious threat to the tenure system which has been the repository of these important values.

I. THE TENURE SYSTEM PROTECTS ACADEMIC FREEDOM AND ACADEMIC EXCELLENCE.

A. The Present Tenure System.

Almost all institutions of higher education in the United States confer some measure of tenure, either under a formal plan or by established practice. C. Byse and L. Joughin, *Tenure in American Higher Education: Plans, Practices, and the Law* 9 (1959). The tenure system in effect at Wisconsin State University, Oshkosh, is typical of college tenure systems in the United States. See *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1086-1101 (1968). Affirmance of the decision below would appear to render unconstitutional practices presently followed by almost all colleges in the United States.*

Prior to achieving tenure, the instructor is in a probationary status, serving pursuant to a fixed-term contract. 81 Harv. L. Rev. at 1090. The college may not discharge the instructor during the contract term without a statement of reasons and a full hearing analogous to that afforded tenured faculty members. 81 Harv. L. Rev. at 1090-91.

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* Practices followed by public secondary and elementary schools would also be affected. Also, most state and federal civil service employees are hired initially in a probationary status and, while probationers, their employment may be terminated without reasons and a hearing. Presumably, the constitutionality of these civil service systems would be affected.

1101. However, a college may decide not to renew his contract without giving a statement of reasons or a hearing. 81 Harv. L. Rev. at 1090. Nonrenewal decisions are made by the faculty members of the instructor's department and by administrative officers. Notice of the nonrenewal decision is required well in advance of the expiration of the contract to permit the instructor to secure a new position with minimum personal inconvenience.

The probationary period is of limited length, and normally does not exceed seven years. *1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors and Association of American Colleges* in Academic Freedom and Tenure 33, 37 (L. Joughin ed. 1969, hereinafter referred to as Joughin). Prior to the end of the probationary period, the college must decide whether or not the instructor should be granted tenure. 81 Harv. L. Rev. at 1091. A decision not to grant tenure is ordinarily embodied in a notice of contract nonrenewal.

After achieving tenure, the faculty member may be removed only for cause. 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 971 (3d ed. 1967). The tenured faculty member is entitled to a hearing with prior notice of the reasons which allegedly constitute cause. *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings of the American Association of University Professors and Association of American Colleges* in Joughin 40. Only serious breaches of duty justify dismissal for cause.*

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* For examples of what constitutes adequate cause, see 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 963 (3d ed. 1967) and *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1094-95 (1968).

In summary, a tenured member may be dismissed only for cause with a statement of reasons and a hearing, whereas a probationary member's contract may be permitted to expire, with adequate notice thereof, without cause and its attendant procedural requirements.

B. The Goals Of The Evolving Tenure System Are Academic Freedom and Academic Excellence.

Since tenure first appeared in American public schools in the 1880's, its objective has been "to protect the teachers against unjust removal after having undergone an adequate probationary period." *McSherry* v. *City of St. Paul*, 277 N.W. 541, 544 (Minn. 1938).

The protection afforded by tenure has several purposes, among them: (1) to prevent political control of schools; (2) to provide academic freedom for teachers; and (3) to prevent discharge of teachers for political, religious or other unjust personal reasons. *Teacher Tenure,* Journal of the National Education Association 194 (1934).

However, the academic community was concerned that tenure had the potential for breeding mediocrity since the award of tenure relieves the tenured member of competitive incentives. F. Machlup, *In Defense of Academic Tenure* in Joughin 306, 316-18. To remedy this problem, the tenure system has always included a probationary period, which usually does not exceed seven years. The seven-year period is longer than that generally found in tenure systems at lower levels of education and in civil service systems because at the college level it is both more exacting and more important to judge accurately the capabilities of the young teacher-scholar.*

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* For a discussion of the reasons for the length of the probationary period, see H. Wriston, *Academic Tenure,* 9 American Scholar 339, 344 (1940).

The tenure system has evolved over many years and has been adopted by the vast majority of colleges. R. Hofstadter and W. Metzger, *The Development of Academic Freedom in the United States* 480-90 (1956). However, experimentation continues among colleges in the United States. For instance, a few state colleges at present provide hearing rights to probationary faculty members whose contracts are not renewed. See *Toney* v. *Reagan*, 326 F.Supp. 1093, 1096 (N.D. Cal. 1971). The consequences of tenure for innovation and achievement among senior instructors is a subject of current, serious discussion. See *On Academic Tenure*, Harvard Today (Dec., 1971). Therefore, it would be erroneous to assume that the tenure system has ceased to evolve and is now static. Colleges have practical incentives for experimentation and for the adoption of modifications to the tenure system preferred by college instructors. Most important, colleges today are free to engage in this experimentation. However, if the decision below is affirmed, a uniform rule will be imposed on all colleges, and freedom to experiment will be limited by judicial fiat.

II. THE PROCEDURES ORDERED BELOW WILL NOT PROTECT FIRST AMENDMENT RIGHTS, BUT WILL BURDEN COLLEGE PERSONNEL.

The *in terrorem* argument has been advanced that hearing rights should be awarded to nonrenewed probationary instructors because there exists in this country a history of wholesale reprisals against teachers who have exercised their constitutional rights. See Brief of the National Education Association as Amicus Curiae in Support of the Respondent, *Perry* v. *Sindermann*, Supreme Court of the United States, No. 70-36 at 4-13. If indeed there are wholesale violations of

First Amendment rights in the academic community, then this country is in a deplorable condition that no hearing procedure ordered by this Court can possibly correct. In fact, in making nonrenewal decisions the vast majority of college administrators abide by the sound traditions of free discourse in the academic community. This Court must decide whether, in those few instances in which probationary instructors' rights were allegedly violated, the hearing ordered below would have served as a prophylactic and whether, on balance, it is wise for this Court to require every public college to afford a hearing upon demand to every probationary instructor whose contract is not renewed.

A. The Relief Ordered Below Is An Illusory Remedy.

"The heart of the tenure system is the requirement of specified cause for dismissal." *Developments in the Law, Academic Freedom*, 81 Harv. L. Rev. 1045, 1094 (1968); see *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153, 1159-60 (8th Cir. 1969), *cert. denied* 396 U.S. 843 (1969). In the instant case, the instructor contended that due process required the nonrenewal decision likewise to be based on definite and ascertainable standards. 310 F. Supp. at 982. The district court disagreed and admitted: "To accept the plaintiff's contention would be to erect a constitutional requirement even more severe than the showing of 'cause' now required by Wisconsin law in the case of tenured professors." 310 F. Supp. at 983.

The district court held that in reviewing the nonrenewal decision (as would not be true in the case of a tenured professor):

> "... the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." 310 F. Supp. at 979.

At the hearing ordered by the district court:

> "The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are *wholly inappropriate* as a basis for decision or that they are *wholly without basis in fact* would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." (Emphasis added.) 310 F. Supp. at 980.

The district court was clearly correct in perceiving that the factors involved in evaluating an instructor are difficult to define with precision. This was recognized in a recent case which concerned an alleged improper denial of promotion:

> "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

The necessary imprecision of standards governing nonrenewal decisions and other similar personnel decisions is in sharp contrast to standards governing dismissal of a tenured faculty member for cause:

> "We do not entertain illusions concerning the effectiveness of machinery designed to strengthen the principles of academic freedom in matters not related to tenure. Even under ideal conditions, the standards applied to the selection of a scholar for a new appointment must be different from the standards applied in the termination of tenure. To be sure, competency and integrity ought to be the paramount criteria in either case. But there is no reliable way of separating a judgment of *comparative* competence and integrity

> from judgments of many other personal traits, social graces, congeniality, professional likemindedness; and undoubtedly, *comparative* evaluation is the basis of decisions on new appointments and promotions. This is not so, however, with regard to the termination of the tenure of a college or university teacher. In this situation the problem is no longer one of comparing different qualities of achievements, but of finding that certain *minimum* standards have not been met—that is, of finding that the incumbent is *incompetent* or *dishonest*. Such a finding can and should be subjected to certain procedural tests and these tests are the essence of tenure rules. *It would hardly be practicable or desirable to devise strict procedural tests for all the other possible questions in respect to which academic freedom may be violated.*" (Last emphasis added.) F. Machlup, *On Some Misconceptions Concerning Academic Freedom* in Joughin 177, 185-86.

Since comparative evaluation is frequently the basis of a decision not to renew an instructor's contract, which embodies a decision not to grant tenure, the already imprecise standards for nonrenewal become even more elusive. Although the nonrenewed instructor may be quite competent, the number of tenured slots may be limited, particularly in times of budgetary cutbacks, and another probationary instructor may be preferred. If the nonrenewed instructor were entitled to a hearing, the successful instructor would be his true adversary. Would the adversary be allowed to appear at the hearing to show that he is, in fact, better? His own job, after all, may be at stake. Likewise, the nonrenewed instructor may be evaluated in comparison to a prospective instructor from outside the college who may replace him. Is the job applicant entitled to a hearing if the offer to him is withdrawn? These are not hypothetical illustrations, but are day-to-day occurrences on college campuses.

This Court should not be under the illusion that the procedures ordered below will ferret out violations of First Amendment rights. An authoritative commentator has observed:

> "The difficulty of distinguishing between different reasons for 'noncontinuance' is well attested to by the experience with nonrenewals of contracts of nontenured teachers. It is rarely possible to prove that the decision not to renew a contract was influenced, let alone determined, by some offensive or embarrassing publications or utterances of the teacher concerned. As a matter of fact, the persons who make the decision may themselves not know what motivates them: do they judge him to be a poor teacher, do they dislike him as a person, or do they dislike what he wrote or said?" F. Machlup, *In Defense of Academic Tenure* in Joughin 306, 329-30.

The courts below, despite these impediments, forged ahead to impose a crazy-quilt procedure quite unprecedented in Anglo-American jurisprudence: a hearing conducted by an agency in which there are no "ascertainable standards" against which to weigh the evidence and in which the agency will prevail unless it has acted "wholly without basis in fact," the factual basis to include subjective animadversions of members of the agency. The hearing would be a mockery of due process.

B. This Illusory Remedy Will Divert College Time And Attention From The Needs of Education.

Every year scores of thousands of probationary instructors at public colleges throughout the country are evaluated and a significant number are notified of nonretention. The hearing ordered below will be available to each such instructor, at great inconvenience to the college. See *Schirck* v. *Thomas,* 447 F.2d 1025 (7th Cir.

1971). A hearing requirement will impair the ability of a college to withhold contract renewal from less suitable instructors but it will not afford meaningful protection of First Amendment rights.

The courts below recognized that more protective procedures would obliterate the distinction between tenured and probationary instructors and impose, without legislative or administrative sanction, a system of instant tenure. 310 F. Supp. at 979, 446 F. 2d at 808; see also *Rhine* v. *International Y.M.C.A. College,* 162 N.E. 2d 56, 60 (Mass. 1959). This undesired result may nevertheless prove inevitable. The imprecise and unworkable standards contemplated by the courts below may well evolve into some more definite mold drawn from prior judicial experience in reviewing decisions of administrative agencies; *e.g.*, was the agency's action reasonable or supported by substantial evidence? See K. Davis, *Administrative Law Text* 523-25 (1959). The decision whether to modify the probationary period of the tenure system is for legislatures, governing boards and colleges to make, having the benefits of trial and error and close monitoring of the results.

In any event, college personnel conscientiously attempting to comply with the procedure ordered below may be so baffled by its ineffable requirements that tenure may be granted by default. This problem could be particularly acute if those making the decisions were required to articulate the "subtle reasons" which the district court stated will suffice.

Nonrenewal decisions are not normally made by one man, but result from evaluations by a number of departmental

colleagues and appropriate college officers. Customarily, the first step in deciding whether to renew a contract is a vote among the faculty members of the probationary instructor's department. If a statement of reasons is required, 1) Professor A who voted for non-retention of Instructor X because he preferred another instructor may refuse to subscribe to a statement of reasons reflecting 2) Professor B's doubts about the quality of Instructor X's publications and 3) both professors may refuse to subscribe to the chairman's reason that the department is overloaded with tenured members in Instructor X's field of expertise. Many precious hours might be demanded simply to agree upon a statement of reasons.

The *amici curiae* strongly urge this Court to consider the practical effect these procedures would have on the men and women who must make renewal decisions. Most of them are not administrators. These academic personnel are not inclined to relish the handling of dossiers, the preparation of administrative memoranda, and attendance at innumerable hearings and meetings. There is a danger that the decision below, if affirmed, will lead in some cases to an abrogation by college personnel of their traditional evaluative functions. Tenure by default will harm the educational program by depriving students of the best judgment of college faculty and administrators in deciding who merits tenure. Sooner or later an intolerable strain would be placed on the tenure system as pressure mounted to purge the faculty of instructors who should not have been granted tenure in the first instance. Tenure —often described as the cornerstone of academic freedom—would no longer afford meaningful protection.

The court of appeals recognized that, in deciding questions of the sort presented here for review, a balancing test is appropriate. *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886 (1961).

The *amici curiae* suggest that the courts below, after conscientiously struggling with the problem, struck an improper balance. The hearing ordered, if literally complied with, would provide little protection to the complaining instructor, but would handicap colleges in deciding which instructors merit tenure. A hearing which did provide more than an illusory procedural safeguard to the probationary instructor would obliterate the time-tested distinction between tenured and probationary faculty members.

The existing tenure system strikes the proper balance since it allows for merit selection of tenured faculty members while protecting academic freedom to the fullest practicable extent. Not every harm or possible arbitrariness to the citizen can be prevented by the Constitution.

One academician, expressing approval of the tenure system with its probationary period, wisely stated:

> "We gain nothing by protecting the incompetent; we lose everything by favoring the arbitrary. We have a very delicate task on our hands and we must be just to all parties concerned. No compromise ever appeals to all concerned. But in general only compromises will work." G. Boas, *The Professor's Obligations And Immunities*, 9 American Scholar 429, 432 (1940).

The probationary instructor who sincerely believes his First Amendment rights were violated may seek redress in federal or state courts for violations of his civil rights* and have full benefit of discovery processes to unearth evidence and prove his charges. That forum is available without significant interference with the functioning of public colleges.**

III. THE DECISIONS OF THIS COURT SUPPORT THE POSITION OF THE AMICI CURIAE THAT THE TENURE SYSTEM IS NOT UNCONSTITUTIONAL.

This Court, in defining the limits of procedural due process, has stated:

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961).

In the *Cafeteria Workers* case, this Court held that the summary dismissal of a short-order cook who worked in a cafeteria located on the premises of a defense facility did not violate due process. The cook was dismissed from employment at the instance of military authorities in charge

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* Indeed, the complaint in this case contains such a count.

** Undoubtedly, many instructors who are unsuccessful at a college-level hearing will seek *de novo* consideration of their cases by the federal courts. See dissenting opinion of Judge Duffy, *Roth* v. *Board of Regents*, 446 F.2d 806, 811-12 (7th Cir. 1971). In cases in which First Amendment rights have been violated, it is unlikely that a minimal college-level hearing will be adequate because of institutional pressures on the hearing tribunal. See *Duke* v. *North Texas State University*, Civil No. 1977 (E.D. Tex., Sherman Div., Sept. 1, 1971). See also, *Schirck* v. *Thomas*, 447 F.2d 1025, 1027-28 (7th Cir. 1971).

of the defense facility. No reasons for termination had been specified or suggested by the military authorities.

More recent decisions of this Court have specified situations in which procedural due process requires a prior hearing accompanied by a statement of the reasons underlying governmental actions affecting private interests. First, a public employee may not be summarily dismissed for refusing to swear that he does not believe in the overthrow of the government by force or violence. *Connell v. Higginbotham*, 403 U.S. 207 (1971). Second, the income of a poor person may not be terminated, either by wage garnishment or by cutting off welfare benefits, without notice and a prior hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42n.9 and accompanying text (1969); *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970). Third, a state license may not be summarily revoked where the effect of license revocation might be to preclude a person from pursuing his livelihood. *Bell v. Burson*, 402 U.S. 535, 539 (1971). Fourth, an individual may not be subjected by the government to public disgrace and humiliation, such as being labeled an excessive drinker, without a prior hearing. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The case of a probationary instructor whose contract is not renewed is not analogous to any of the above cases, and should be treated under the general rule stated in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961), that public employment may ordinarily be terminated without a prior hearing.

The *Connell* case presents a unique situation since by statute, guilt of subversive conduct was irrebuttably presumed by refusing to sign the oath. See *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). A

nonretained instructor does not fall within the category of the poor persons with whom the Court was concerned in the *Sniadach* and *Goldberg* cases. A probationary instructor is not by the mere fact of nonretention subjected to public humiliation and disgrace as was the petitioner in *Constantineau*. Nor does the reputation of a probationary instructor suffer so severely when his contract is not renewed that he may be deprived of his ability to pursue his profession, as was the petitioner in *Bell*.

There are so many reasons for nonretention beside professional incompetence that little inference can be drawn. For instance, not uncommonly, a college may prefer not to retain an instructor who received a degree from the college to avoid "inbreeding." Some colleges have a conscious policy of turn-over among probationary instructors. Also, college needs and emphases are constantly changing, requiring different faculty compositions. Budget cutbacks often compel colleges not to retain probationary instructors. Furthermore, since nonretention generally involves comparative evaluation, an instructor who may be deemed less than qualified at one college may be snapped up by another college who considers him well qualified indeed.

The reputations of college instructors, as of most professionals, are not so frail that the mere fact of contract nonrenewal will bar the instructor from the teaching profession or, indeed, will result in any lengthy unemployment. The American Civil Liberties Union, which favors hearing rights for probationary instructors, has stated:

> "This experimental phase [the probationary period] of a teacher's career is wisely characterized by a minimum of formal judgment; teachers come and go

without recorded praise or blame." *Academic Due Process*, A Statement of the American Civil Liberties Union in C. Byse and L. Joughin, *Tenure in American Higher Education: Plans, Practices, and the Law* 190, 196 (1959).*

In *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970), this Court stated that, while the expense of a prior hearing must be considered, mere expense does not justify denying a hearing in appropriate situations. Although affirmance of the decision below will undoubtedly cause considerable additional expense to public colleges, the burden with which the *amici curiae* are primarily concerned is not that of expense.

The hearings ordered by this Court in the five decisions just discussed involve the determination of adjudicative facts susceptible to reasonably prompt and precise determination; e.g., did the employee engage in subversive acts? was the alleged debt owed? did the welfare recipient's income exceed the eligibility level? was there a reasonable possibility that the motorist would be found negligent? was the individual frequently intoxicated? However, as shown above, a hearing on contract nonrenewal involves the review of a decision arrived at through the exercise of discretion and judgment, and which often is based on a com-

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* A nonretained instructor is usually given notice of nonrenewal well in advance of the expiration of his contract. Not uncommonly, colleges give the instructor the opportunity to resign. It may be argued that this considerate procedure is an admission by colleges that nonrenewal has an adverse impact on reputation. In fact, the procedure is a common courtesy extended by many employers, public and private. Only in rare situations would the mere fact of nonretention, if known, be of determinative significance to a prospective employer.

parative evaluation or the consideration of factors unrelated to the affected instructor. Therefore, the burden of concern to the *amicus curiae* is that of requiring many thousands of hearings involving matters not readily capable of adjudication.

Under the decisions of this Court, it is clear that the court of appeals failed to give proper weight to the pertinent governmental and private interests.

CONCLUSION

Our nation's colleges are conscientiously attempting to provide quality education to students and to foster an atmosphere in which full freedom of discussion prevails. In pursuing these objectives, a tenure system has developed which undoubtedly will continue to evolve. Thus far the system has been shaped through discussion by, and compromise among, college professors of varying seniority and administrators. The decision below injects the courts into the evolution of that system, imposing federal supervision over common-place yet important details of college life without any clear constitutional mandate for doing so.

The present tenure system is not unconstitutional, and the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES, ET AL.

v.

ROTH

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

The American Association of University Professors (the "AAUP") appears *amicus curiae*, with consent of all parties, in support of respondent. This is a companion brief to that filed by *amicus* in *Perry* v. *Sindermann*, Case No. 70-36, which has been paired for argument with the instant case. This brief, therefore, is essentially to complement considerations developed in the *Sindermann* brief.

INTEREST OF AMICUS CURIAE

The statement of *Interest of Amicus* in our *Sindermann* brief is fully applicable to the instant case. The present statement focuses on the concern—indicated in the petition for *certiorari* in the instant case, the briefs in support of the petition, and the dissenting opinion in the Court of Appeals below—as to the implications for the integrity of the tenure system, the objective of quality education, and the possible burdens and problems, both for our colleges and universities and the courts, that the opportunity for procedural due process for nontenured faculty may present.

The AAUP was established in 1915; its founders included such eminent scholars and educational leaders and philosophers as Roscoe Pound, John Wigmore, John Dewey, Arthur O. Lovejoy, Wilbur L. Cross, A. A. Michelson, and Edwin R. A. Seligman. Its current membership consists of approximately 90,000 faculty members of accredited institutions of higher education. As indicated by AAUP's issuance in 1915 itself of a *Declaration of Principles* on academic freedom and tenure, the subsequent development of the 1940 *Statement of Principles on Academic Freedom and Tenure* (which now carries the endorsement of over eighty of the leading educational and professional organizations), and its development most recently of the 1971 *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, the issues in the *Roth* case as they have implications for adequate standards and practices relating to academic freedom, tenure, and the quality of higher education have been a matter of primary and constant concern to the AAUP. AAUP has played a crucial role as well in the resolution, during the past half century, of academic

freedom, tenure, and related academic disputes, informally as adviser and mediator whenever possible, and formally as investigating agency when necessary.

As summarized in a recent intensive study, *Developments in the Law—Academic Freedom*, 81 *Harv. L. Rev.* 1045 (1968), the AAUP has as its basic mission "to safeguard the integrity of higher education"; it is "generally accepted today as the spokesman for college teachers, and its assistance is sought in virtually every academic freedom dispute"; "it has never considered itself to be principally an advocatory legal aid society. Rather, the AAUP views protecting the individual's rights as part of a higher function; it sees each dispute as an occasion to clarify and secure acceptance of what it believes to be the general principles underlying academic freedom." 81 *Harv. L. Rev.* 1045, 1105-1106, 1109. Thus, membership in the Association is not a prerequisite for assistance. Indeed, a very substantial number of its cases has always related to nonmembers; in addition to faculty, institutions and administrators seek and obtain the advice and intervention of *amicus* in the resolution of cases and problems concerning academic freedom and tenure.

The Association has additionally acted to support academic principles and standards in litigation significantly affecting such principles and standards. It has filed briefs as *amicus* in this Court in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Jones* v. *Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert.* denied 397 U.S. 991 (1970); and in *Sindermann*. Various local chapters have also participated in cases that have come before this Court and in lower courts, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964);

Georgia Conference of the AAUP v. *Board of Regents*, 246 F. Supp. 553 (N.D. Ga. 1965) and *Heckler* v. *Shepard*, 243 F. Supp. 841 (D. Ida. 1965).

The AAUP believes that during the past half century it has as much as any organization acted continuously and comprehensively to develop and further the principles and standards relating to tenure as a safeguard which is fundamental and, in the judgment of *amicus*, necessary for the maintenance of academic freedom. The AAUP has emphasized throughout the fundamental role of adequate procedural safeguards as necessary to give meaning and reality to these as to other substantive principles and safeguards, as well as to the constitutional rights generally of faculty, as teachers and as citizens. It is in this context that *amicus* filed its brief in *Sindermann*, and does so in the instant case.

SUMMARY OF ARGUMENT

Amicus emphasizes its conviction, indicated in its *Sindermann* brief, that the law in this area should continue to evolve "under this Court's general guidance—based upon a broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require *some* procedural safeguards in *every* case." (See pages 11 and 36, and Part II generally, of that brief.)

In the instant case, affirmance of the opinions and order below is essential in order to provide minimal due process for teachers in matters critical to their basic livelihood. Such due process as it relates specifically to teachers will act in furtherance of principles and standards developed for the protection of academic freedom, and of tenure as a fundamental safeguard of such freedom. It is our position, moreover, that pro-

cedural due process, as exemplified in the facts of the instant case by a statement of reasons for nonrenewal and the carefully delimited form of administrative hearing provided in the order of the trial court, would not present undue (if any) burdens upon our colleges and universities, or constitute intrusion by the courts into their affairs. We shall contend further that the order of the trial court falls well within the area of discretion traditionally accorded the *nisi prius* court. We shall finally submit that further proceedings in the case in accordance with the order and opinions below, will provide an excellent opportunity to appraise the validity of the respective concerns and claims presented in this case and in the numerous other cases that have been developing in this sensitive and complex problem area.

ARGUMENT

I. Affirmance by This Court of the Opinions Below Would Essentially Apply Minimal Procedural Due Process to Teachers as it Has to Other Citizens. Such Application Is Especially Relevant to the Protection of Academic Principles and Standards.

The role of procedural due process in matters or action substantially affecting a person's livelihood and welfare has been one of evolving concern and refinement within the academic, as it has been for the general community. *Cf.*, the *Statement of Interest* and *Part II* of the *Sindermann* brief; *Goldberg* v. *Kelly*, 379 U.S. 254 (1970); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 *Duke L. J.* 841. As indicated by the *Sindermann* case itself, many colleges and universities do not recognize tenure altogether. Commonly in such institutions, no internal protection or restraint against wholly arbitrary action is provided any faculty member, even if in direct derogation of

academic principles. *Cf. Thaw* v. *Board of Public Instruction*, 432 F.2d 98 (5th Cir. 1970). In numerous institutions tenure is recognized, but only for certain ranks of faculty; other faculty members can and do remain in untenured status indefinitely. In various institutions the period of probation can be as long as fifteen years or even more; as indicated in the petition for the writ of *certiorari* (see its footnote 1), the period of probation is often increased, frequently with retroactive effect. In general, under accepted academic practice, tenure status relates only to the institution itself, so that with the current degree of mobility in the academic as in other communities or professions, the number of teachers who, for this reason, remain indefinitely in nontenure status, or who return to nontenure from tenured status, is substantial. Accordingly, *Sindermann*, *Roth*, and similar cases afford protection of minimal due process for an important part of our teaching community.

Appellants are correct that to give identical or substantially the same protection to all faculty would act to undermine the concept of tenure. It is for this very reason that the AAUP earlier informally accepted as appropriate the premise that, unless considerations violative of academic freedom are significantly involved, the matter of procedural due process as it relates to the renewal or nonrenewal of faculty should essentially be a matter of institutional determination. AAUP Advisory Letter No. 13. Joughin, *ed., Academic Freedom and Tenure* (1969 ed.) 136. For those colleges and universities wishing to provide due process for their faculty in nonrenewal as in other respects, the AAUP acted during this period as a clearing house or adviser in regard to the development of or experience relating to such procedures.

The adoption by *amicus* in 1971 of its Statement on *Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (the "1971 *Statement*"), treated *in extenso* in its Sindermann brief, stemmed from a steadily growing concern within the academic profession as to the need for at least some procedural safeguards in this area. In part, this concern reflected the same considerations that underlie *Goldberg, Sniadach*, and other recent cases. In part, the development of the 1971 *Statement* evolved out of the increasing awareness of the Association, that the absence of *any* safeguards with respect to renewal or nonrenewal of faculty, whether generally in the particular institution, or for particular ranks or individuals, has pervasive implications for the protection of academic freedom itself: Absent any and all procedural rights or safeguards for nonrenewal of nontenured faculty, termination of appointments for considerations violative of academic freedom or related constitutional rights can and does become essentially a matter of administrative exercise of patience. Freedom of thought and inquiry is hardly the less inhibited because reprisal for its exercise is subject to delay. Rather, the delay can and does act to cloak the fact of reprisal; further, it adds to the already difficult burden of proof upon the faculty member to establish that the nonrenewal was in derogation or denial of academic freedom.[1]

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[1] The variations and permutations that are possible and have developed as to the uncertainties and threats to academic freedom that persist for those in nontenure status are dishearteningly numerous. As one example, the Association in 1968 found it desirable to publish a *Report on Retirement and Academic Freedom* because of the problems as to maintenance of such freedom for retired faculty members who remain at an institution in nontenured status or for those who are approaching retirement age and desire to remain in active service. 54 *AAUP Bull.* 425 (1968).

As a result, in a basic sense, the concept of tenure operates by way of *analogy* as well as of contrast, as to the appropriateness and need of some procedural due process for those in nontenured status:

> The tenure concept itself (that after a designated probationary period during which the employer has had an adequate opportunity for evaluation, termination of a person's appointment is appropriate (i) only for reasons related directly and substantially to fitness for that appointment, (ii) established by procedures reflecting basic concepts of due process) has, like Civil Service and similar, continuous appointments outside the academic community, its independent justification as a matter of sound personnel practice. As developed in the academic community, however, its primary function is to provide the teacher and researcher the necessary sense of assurance of protection against the risk of loss of his position for reasons violative of academic freedom and related constitutional rights: Without appropriate procedural protection from arbitrary termination, the teacher's sense of freedom in teaching and research is necessarily inhibited and diminished.

If, as the academic community in this and in other countries has insisted, this premise is correct, then *some* procedural due process is necessary for *all* teachers and researchers against wholly arbitrary termination, unless, of course, liberty of thought and inquiry within the academic community is to be enjoyed only by those with tenure. From the fact that the same degree of procedural due process ought not necessarily be provided for nontenured as for tenured faculty, it hardly follows that complete denial of due process to nontenured faculty is the necessary or appropriate alternative.

Experience has indicated in still another key respect the desirability, exactly out of respect for the tenure concept, for *some* procedural protection of nontenured teachers: If probationary faculty are denied *any* procedural protection against wholly improper termination, or termination in derogation of academic freedom or First Amendment rights, then strong pressures develop and persist—by individual action during a "seller's market" and by collective action through organization or bargaining at other times—to grant tenure prematurely, either by the adoption of too short a period of probation and evaluation or by untimely exercise of administrative discretion. It is precisely such pressures and response to them that serve to undermine the tenure concept and the objective of quality education.

In brief, *amicus* submits that (1) nontenured faculty are entitled to procedural due process as are other citizens under the Fourteenth Amendment in matters basic to their welfare; and (2) there is a basic interrelationship of due process and academic freedom with regard to probationary just as there is with regard to tenured faculty, although the specific nature of the due process in each case may and should differ in substantial respects. As the second of these considerations further suggests, it is entirely too simplistic to consider the matter one of a conflict of the interests of the institution and those of its individual faculty members. Rather, due process would serve the interests of both.

II. Minimal Due Process, as Exemplified by a Statement of Reasons and a Limited Hearing, Would Not Present Risks of Institutional Hardship, Unworkability, or Unwarranted Intrusion of the Federal Courts Into Higher Education.

The AAUP does not know of any substantial body of evidence upon which to predicate a conclusion of any significant risk of complex, expensive, or unworkable burdens that would be imposed upon colleges and universities merely by requiring *some* due process in connection with nonrenewals. Prior and wholly unrelated to its 1971 *Statement*, the Association had recommended —and many institutions have adopted as policy—procedures of varying nature for resolution of academic disputes, involving either institutional proceedings against faculty, or grievances by faculty against institutions. These procedures have encompassed, comprehensively, such matters as salary, assignment of teaching duties, assignment of space or other facilities, and propriety of conduct generally. Procedures have been recommended for contested terminations of appointments based on health considerations or discontinuance of programs or departments of instruction. Most recently focus has been given to procedures regarding terminations or reassignments of faculty in the varied and difficult situations of financial exigency in which many institutions are finding themselves today. As indicated in the *Sindermann* brief, in the context of nonrenewals itself, where academic freedom is in issue, procedures have been in existence for a number of years; such procedures have been extended to graduate student academic staff and administrative personnel with academic responsibilities. In the context of nonrenewals generally, various institutions have provided for internal procedures as a matter of policy, reflecting what they consider a basic sense of due process. See in

general the AAUP's 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, 54 *AAUP Bull.* 448 (1968), especially sections 4(c), 10, 11, 13 and 15; see also footnote 1, *supra*. The considered judgment of the Association is that the perception as to the need in the wide variety of instances of academic dispute or concern for *some* element or form of due process *as determined by and related to the specific type of grievance or action*, has not in fact acted to impose inappropriate or undue burdens or hardships.

Affirmative considerations apply as well. The fact of entitlement of probationary faculty to stated reasons and limited intramural review with respect to renewal or nonrenewal, encourages and assures the very kind of careful evaluation *prior* to decision that they have a right to expect as a matter of good faith on the part of the employing institution, and that are at least implicit in their appointments as probationary faculty; such evaluation will permit and indeed facilitate the rejection of the unqualified as well as the retention of those with promise, and contribute to rather than derogate from the development of a strong and capable faculty body. In sensitive fact situations as in *Sindermann* and *Roth*, to the extent that procedures are available which help assure sound and correct decisions, to that extent there are reduced or eliminated internal and often external tensions and stresses—and so the burdens and hardships—for the college or university community; these tensions and stresses commonly follow when purely arbitrary action is possible and is in specific issue, and the academic and outside communities are in no position to reach a judgment or to have confidence in the action taken exactly because no due

process has been provided.[2] The experience of the AAUP with respect to dismissal proceedings indicates that the fact of due process as an integral right, itself operates to minimize the actual need for proceedings: As to administration, the presence of the right of the faculty member to due process serves, preventively, as a pressure on it to take appropriate care initially in reaching proper and sound decisions; as to faculty, the implications for a teacher of an adverse decision *after* due process, discourages improper challenges of administrative action. With respect to initial appointments, the entitlement of an appointee to some due process in case of termination will operate to insure *greater* care in the selection process to the advantage of the institution, rather than in "a teaching force of homogenized mediocrities," as suggested in appellant's petition (page 12).

Respectfully, the AAUP wishes to note for the information of this Court that the alleged administrative inconvenience accompanying the merely minimal degree of procedural due process affirmed by the court below is an inconvenience imposed more substantially on senior faculty members not represented here by the *amici* in support of the petitioner, but substantially represented by the AAUP. Under general practice in institutions of higher education, it is the senior faculty

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[2] For an example of a case developing in sharp focus the problems, burdens, and exacerbations that the *absence* of due process provides for the university itself as well as for the faculty member, see *Academic Freedom and Tenure: Gonzaga University*, 51 *AAUP Bull.* 8, especially 13-14 (1965). Much of the problem in that case resulted from the fact that at issue in the case was whether the faculty member had achieved tenure status or was still on probationary appointment, and the failure of the institution, acting on the latter assumption, to provide *any* due process.

within each department which makes the critical recommendation to renew or not to renew the contracts of probationary faculty members, together with the particular senior faculty member currently serving as departmental chairman. It is therefore ordinarily *their* statement of reasons which must be furnished, and the integrity of *their* judgment which the limited hearing permits to be reviewed. The position of the Association in this case therefore ought not to be understood as advocating a position it has not fully weighed in terms of the implications of the decision below to its own members who are to be bound by it. Perhaps more than any other party before this Court, the AAUP has been keenly concerned to avoid the constitutionalizing of procedures not truly essential to fundamentally fair treatment of probationary faculty members or procedures unreasonably imposing upon the time or discretion of more senior faculty members responsible in the first instance for the quality of their own departments. That the Association's own 1971 *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* in certain respects goes further than the decision below (and indeed was proposed by the Association's oldest standing committee, all of whose members are themselves tenured and affected by the Statement in their administrative capacities), reflects a clear deliberation and conclusion that the gain in care and quality of renewal decisions and the gain in fundamental fairness to the individual whose career is to be affected make the burdens of care and review a positive and essential gain to the quality of administration itself.

Similarly, with respect to the fears expressed as to improper intrusion by courts in academic matters (see, *e.g.*, the dissenting opinion below, 446 F.2d 810, 811),

the argument is better seen the other way. To the extent that procedural due process is provided *within* the academic community, there will be much less basis for pressure upon, or need for, the courts to provide it. Likewise, even when judicial recourse may be sought on substantive First Amendment and other constitutional rights, the courts will profit from receiving through the institutional proceedings judgments on the academic aspects of the case of those who are expert and sophisticated in such matters and who are in the best position to make the "exceedingly difficult" "personal judgments" on the "intangible qualities" cardinal to academic decisions that were a matter of concern in the dissenting opinion below. In short, *amicus* reads the effect of the order and opinions below not to require that academic judgments and decisions be made by the courts, but rather that they be made with more reassuring care within the academic community itself.

Clearly, in the matter of nonrenewals, the reconciliation of opposing factors both as they relate to basic due process of faculty as citizens, and as they relate directly to the needs and purposes of the academic function, has not been an easy one, as indicated by the involved history of the development of procedures within the academic community itself. It is as a result of this very history, however, that it is the considered present judgment of *amicus* that the degree of due process affirmed below is consistent with and indeed would further the objective of quality education and the goals and purposes for which the tenure principle itself has been developed.

III. The Order of the Trial Court Falls Within the Area of Discretion Traditionally and Soundly Accorded That Court. Further Proceedings in the Case Under That Order Would Serve Constructively to Test the Validity of the Respective Positions and Concerns Presented in This and Similar Cases.

As indicated by the opinions below and the statement of facts in the petition for *certiorari*, the instant case involves a faculty member who had a contract as a probationary (rather than a purely temporary) faculty member for the academic year 1968-69; he was advised on January 30, 1969, that he would not be reappointed for the 1969-1970 school year; he was given no reasons for the decision, nor was he offered a hearing of any kind. He promptly brought suit in March, 1969. Under the bill of complaint, and as corroborated by the findings below, First Amendment issues are clearly implicated in the case. The case reached the point of possible partial summary judgment a full year later, in March, 1970. At that time the trial court required that the defendants provide the plaintiff a written statement of reasons for the nonrenewal, and within the next three and a half months a hearing in which the plaintiff could respond to the reasons stated for his nonretention.

The trial court indicated that the burden of going forward and the burden of proof would rest with the teacher, and that "Only if he makes a reasonable showing that the reasons stated are *wholly* inappropriate . . . or that they are *wholly* without basis in fact" would the University have any obligation to show that the "stated reasons are not inappropriate" or "that they have a basis in fact." (Emphasis added) (p. 980) There was clear recognition in the opinion that a standard very substantially different from "cause" as required in the case of termination of tenured faculty,

or of nontenured faculty prior to the expiration of their term of appointment, was to be involved. There was sensitive recognition of the necessity that "the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of . . . First Amendment rights (p. 983); to the obligation of the trial court, throughout the proceeding, "to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons" (p. 979); and that "[I]t will not do to ignore [the] danger to the institution and to its central mission of teaching and research" should "in practise . . . the university become so inhibited that . . . the university [will be] . . . unable to rid itself of newcomers whose inadequacies are . . . grave but not easily defined." (p. 979) The order and the explicating memorandum opinion reveal an appreciation of the need for careful balancing of the relevant interests, and for a case by case application of the conflicting considerations. The judgments in these respects were made by a court presumably familiar with the local state university system and in a position best to appraise the implications of these interests and considerations for that system.

Presumably the sensitivity and discernment as so articulated by the trial court will be reflected in the event of further proceedings under the order below. Quite possibly, this Court or *amicus* on the basis of its 1971 *Statement* itself could in various respects develop alternatives or modification in approach to the proceedings envisaged by the order below. This, it is respectfully submitted, is not the issue: In complex and sensitive issues of this nature considerable discretion traditionally rests with the trial court. Such discretion,

as carefully and meticulously exercised in the instant case, can hardly be characterized as unreasonable.

Indeed, the widely varying differences in opinion and appraisal presented in the conflicting decisions and reasoning in the federal and state courts on an issue of sharply growing concern to the academic community, and reflected in the opposing statements of position of the parties and the various *amici* in the instant case itself, suggest the need for the "laboratory" experimentation characterized by the late Mr. Justice Brandeis as desirable in areas of substantial social significance. Given the facts of the instant case; its conceded substantial implications for the academic community; the significant First and Fourteenth Amendment issues implicated; the care and perceptiveness accorded by the trial court to the issues and to their significance for both institution and faculty; and the carefully delimited substantive and procedural bases under which further proceedings would be conducted under the order below, *amicus* suggests that the instant case, in its present posture, provides an admirable opportunity effectively and realistically to test out the validity of the respective positions and contentions before this Court.

CONCLUSION

The matter of procedural due process as it relates to teachers has from the outset been one of evolving refinement and amplification, as required by the developing needs and functions of higher education. *Amicus* agrees with the decisions of the courts below in the instant case that it is entirely too simplistic to think in terms of alternatives that provide full due process or no due process at all.

It has aptly been pointed out by an outstanding authority on administrative law that:

> In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for Government itself against those blunders which leave lasting stains on a system of justice"—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. Gellhorn, Summary of Colloquy on Administrative Law, 6 *Journal of the Society of Public Teachers of Law* (1961) 70, 73.

The American Association of University Professors agrees.

Respectfully submitted,

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In The

SUPREME COURT of the UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the decision not to renew the employment of a non-tenured state university professor for another academic year for reasons which implicate his First Amendment rights must be accompanied by minimal due process, including a statement of reasons and an opportunity for a hearing.

STATEMENT OF THE CASE

David F. Roth (hereinafter "Roth") was employed by the Wisconsin State University-Oshkosh as an Assistant Professor of Political Science and International Studies during the 1968-1969 academic year. (A. 137, 154) On January 30, 1969, Roth was advised that his teaching contract would not be renewed for the coming academic year. At that point, he had not acquired tenure under § 37.31, *Wis. Stats.*, (1967). (A. 154)

On November 21, 1968, a disturbance involving black students had taken place on campus. Roth publicly criticized the University Administration charging, *inter alia*, that it had suspended the entire body of 94 black students without determining individual guilt in accordance with due process. (A. 137, 142, 154)

On December 17, 1968, Roth's academic performance was evaluated by the members of the Tenure Committee of the Political Science Department which voted unanimously to "highly recommend" Roth's appointment. (A. 135). The conclusion of Roth's five senior departmental colleagues was summarized on a standard evaluation form as follows:

Teaching ability	Excellent
Evidence of professional and scholarly growth	Superior
Evidence of services rendered	Excellent (A. 131-135)

Roth saw this report and reviewed it on December 21, 1968. (A. 135)

On January 22, 1969, Dean Arthur H. Darken, who claimed no personal knowledge of Roth's academic perform-

ance, disagreed with the Tenure Committee recommendation that Roth be retained. (A. 135) His reasons were contained in attached "comments" which are not part of the Appendix or record below. (A. 135) Darken's reasons for disagreeing with these recommendations are included in his memorandum to President Roger E. Guiles, dated January 28, 1969. (A. 125-131, and particularly at A. 129) That memorandum deals with Roth's expressions of opinion and activities in response to the Administration's treatment of black students who were allegedly involved in the disturbance of November 21, 1968.

Darken charged that Roth:

1. As to official duties—

a. "Cavalierly" decided not to give a final examination in "breach [of] a major all-university policy that is in the interest of the students." (A. 125)

b. For two weeks, Roth used ½ to ¾ of the class periods "to discuss the student riot and what the University was or was not doing on the matter." Darken acknowledged Roth "did not, however, urge students to protest or to engage in any improper activities." (A. 125-126) This charge was based on "oral reports by four [unnamed] students." (A. 125)

c. "Dr. Roth did not meet any of his classes on Friday, December 20, the day of the Regents meeting on campus. This was observed personally by Vice President Raymond Ramsden. Dr. Roth, however, attended the Regents session that day." (A. 126)

d. Roth did not respond to a request for a meeting with Vice President Ramsden and was "quoted indirectly in the *Milwaukee Journal* . . . to the effect that he was disregarding the . . . request." (A. 127)

2. "Dr. Roth made public statements on a number of occasions that indicate a very unscholarly approach to the truth and the search for knowledge. . . ." Darken referred to three newspaper articles to support this charge.

The Paper, December 23, 1968: "Many of us feel that the authoritarian and autocratic structure of this unversity is no longer tolerable."

The Paper, January 6, 1969: "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes."

The Paper, January 9, 1969: "We won't talk to any Mickey Mouse committee [the Advisory Committee for the Culturally Distinct]." (A. 125-131)

The Darken memorandum was not furnished to Roth, and was not discovered until April 28, 1969, in pre-trial discovery proceedings in District Court. (A. 139)

On January 24, 1969, Darken reconvened a meeting of the Tenure Committee to give his reasons why their unanimous decision to "highly recommend" Roth's retention should be reversed. (A. 130) Roth was not informed of this meeting, nor given prior notice of the evidence Darken was to present. The Department Chairman, Dr. George Willis,[1] who signed the highly favorable departmental evaluation of December 20, 1968, and had personal knowledge of a number of Darken's charges against Roth, was, although a voting member of the committee, also excluded from this meeting. (A. 130, 135, 143)

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[1]At A. 135 the Department Chairman is listed as "Gerry Miller." Respondents assume this reference should read "George Willis."

On January 27, 1969, the four tenured members of the department met with their Chairman, Dr. Willis, and voted as follows (A. 131): Not to retain Dr. Roth (2); Retain Dr. Roth (1); Abstain (2).

Dean Darken reported the results to President Guiles the following day.

> "Consequently, only one member voted in a manner consistent with the original committee vote in mid-December. I am happy, therefore, to be able to make the recommendation that supports the 2-1 vote for non-retention submitted by the Political Science Department's Tenure Committee." (A. 131)

Upon receipt of Dean Darken's report and recommendation, President Guiles reached his decision not to reappoint Roth. (A. 120) Despite his knowledge of the switch in the Tenure Committee's position and of the factual nature of Darken's charges, President Guiles did not undertake a personal investigation of the facts (A. 122-123), nor did he invite Roth to present his version of the facts. Rather, Guiles based his decision entirely on the reasons stated in Darken's memorandum, the second vote of the department, and the recommendations of Dean Darken and Vice President Ramsden. (A. 122-123)

On January 28, 1969, Dean Darken telephoned Roth and notified him that he was not to be retained on the faculty for the 1969-1970 academic year. Roth asked for the reasons but was informed that he was not entitled to an explanation or reasons. (A. 140)

In a letter dated January 30, 1969, President Guiles officially notified Roth of the decision.[2] Guiles neither gave reasons, nor offered Roth a hearing concerning his termination. (A. 124)

President Guiles acted pursuant to Rule II of the Board of Regents of the State Universities which provides:

> "During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case." (A. 121.)

On February 14, 1969, Roth comenced an action under 42 U. S. C. § 1983 in the United States District Court for the Western District of Wisconsin against the Board of Regents and Roger E. Guiles, President of the Wisconsin State University-Oshkosh in which he claimed that the decision not to retain him was made in retaliation for his expression of opinion. Roth also claimed that the university had failed to provide him with either the reasons for the non-retention decision or with an impartial hearing into the merits of such decision in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. (A. 105, 108) Finally, Roth alleged that the non-retention decision would cause damage to his professional reputation and standing. (A. 107)

On May 16, 1969, Roth moved for partial summary judgment. In his affidavits, Roth responded to the charges in the Darken memorandum and admitted certain public statements critical of the administration; amplified newspaper accounts of public positions he had taken; and flatly

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[2]The University was obligated to notify Roth of its decision by February 1, 1969, or his contract would have been automatically renewed in accordance with University rules. (A. 121, 130). This is to be distinguished from the case of a visiting professor who would have no such expectancy.

contradicted other of Darken's factual assertions. (A. 137-140, 141-143)

On March 12, 1970, the District Court entered a memorandum and order granting part of Roth's motion for summary judgment and denying part of it. Defendants' motion for summary judgment was denied.[3]

In this decision, the District Court pointed out that the substantive standards to be used were not the equivalent of statutory tenure.

> "This standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." (A. 165-166)

In granting Roth's motion for partial summary judgment, the District Court concluded that:

> "Substantive constitutional protection for a university professor against non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of

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[3]Roth's motion for summary judgment claimed, in part, that the non-retention decision was not based on ascertainable and definite standards. (A. 136) This was denied by the District Court as was defendants' motion which, in effect, claimed that the non-retention could have been made for any reason and without any procedural safeguards. (A. 113, 157) Neither of these issues has been appealed and the sole issue before this Court is the District Court's order to provide minimal procedural safeguards.

a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." (A. 167)

Because Roth had requested these procedural safeguards, the District Court stayed further proceedings on the remaining substantive issue of whether the non-retention was based upon Roth's expression of opinion or was arbitrary. In so doing, the District Court stated its belief that as a result of the provision of a statement of reasons and a hearing, "the remaining issues in this case will have been clarified and . . . will become more amenable to resolution." (A. 174)

On April 10, 1970, defendants filed a Notice of Appeal (Docket Entry 34) and moved for a stay of the District Court's March 12, 1970, order pending appeal. (Docket Entry 37) An order granting such a stay was entered May 15, 1970. (Docket Entry 38)

On July 1, 1971, the United States Court of Appeals for the Seventh Circuit rendered its decision affirming the District Court. In affirming the decision to extend to professors faced with non-retentian procedural protections including a "glimpse at the reasons and a minimal opportunity to test them," the Court of Appeals observed that:

> "The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (A. 181)

On July 14, 1971, the defendant's motion for a stay of the Court of Appeals mandate was granted and on August 3, 1971, defendants' petition for a Writ of Certiorari was filed with the Supreme Court of the United States. The petition was granted on October 26, 1971.

SUMMARY OF ARGUMENT

Because of the danger that the reasons for not retaining a non-tenured university professor will implicate fundamental First Amendment values, state universities must be constitutionally required to provide non-tenured professors with a statement of reasons for their proposed non-retention and an opportunity for an administrative hearing.

The parties do not dispute that the First Amendment protects a non-tenured professor from a non-retention based on protected expression. Although non-tenured professors have judicial forums available to them, this Court has required that minimal due process be provided where fundamental interests are at stake. "Freedom of expression must be ringed about with adequate bulwarks." *Blount v. Rizzi*, 400 U. S. 410, 416 (1971). Such procedural requirements go beyond the personal interests of the parties involved and look to the community interest in free and vigorous debate.

In the present case, the reasons for Roth's non-retention were based, at least in part, on his expressions of opinion. These reasons were contained in a memorandum prepared for the University President but Roth was not provided a copy of the memorandum or an opportunity for an administrative hearing. Although the presence of the First Amendment controversy in this case is another reason for requiring minimal due process, such procedural protections must be provided in all cases in order to protect the First Amendment rights of non-tenured professors.

Non-tenured professors must also be provided with minimal due process when a non-retention decision is be-

ing made because, on balance, their interest in minimal due process outweighs the government interest in summary adjudication. *Goldberg v. Kelly*, 397 U. S. 254 (1970). In addition to their interest in employment, non-tenured professors had a substantial interest in preventing non-retention decisions based on arbitrary reasons as well as an interest in preventing injury to their professional reputations.

There is no substantial burden on the University in being required to provide non-tenured professors with a statement of reasons. Likewise, the limited number of hearings likely to be required will not be burdensome.

Finally, the District Court did not blur the distinction between tenure and lack of tenure but was careful to point out that the standard for non-retention of non-tenured professors is considerably less severe than the standard of "cause" as has been applied to tenured professors.

ARGUMENT

I. THE PROTECTION OF FIRST AMENDMENT RIGHTS REQUIRES THAT MINIMAL DUE PROCESS BE PROVIDED TO NON-TENURED PROFESSORS WHOSE EMPLOYMENT IS NOT BEING RENEWED.

The issue before this Court is whether the First and Fourteenth Amendments to the United States Constitution required that Roth, a non-tenured university professor, be provided with minimal due process before a decision not to retain him for another academic year could be made. If this Court were to rule that the procedural safeguards of minimal due process are required by the First Amendment, there would be no need to reach the question of whether Fourteenth Amendment procedural due process also requires that such protections be provided to university professors faced with non-retention decisions.[4]

A. *The First Amendment Requires That Non-Tenured Professors Be Provided Procedural Safeguards As A Protection From Improper Non-Retention Decisions.*

Because of the danger that the reasons for not retaining a non-tenured university professor will implicate fundamental First Amendment values, state universities must be

[4]Roth's additional claim that the non-retention decision violated his substantive First Amendment rights and was arbitrary was stayed by the District Court which reasoned that if Roth "is now furnished with a statement of the reasons for his non-retention, notice of an administrative hearing and a hearing, I believe that the remaining issues in this case will have been clarified and that they will become more amenable to resolution." (A. 173-174) This substantive branch of the case is not before this Court.

constitutionally required to provide non-tenured professors with a statement of reasons for their proposed non-retention and an opportunity for an administrative hearing.[5]

It is undisputed that the decision not to retain Roth for the 1969-1970 academic year was based, at least in part, on his public criticism of the University's treatment of black students alleged to have been involved in a campus disturbance. (A. 123, 127-129, 137) Whether such expressions of opinion on the part of a university professor would be protected by the First Amendment ultimately depends upon a balancing of the interests of the parties involved similar to that undertaken in *Pickering v. Board of Educ.*, 391 U. S. 563, 568 (1968).[6]

Nevertheless the danger of such non-retention decisions jeopardizing First Amendment or other fundamental interests is substantial enough to justify the conclusion that minimal due process must be extended to all non-tenured professors.

Although this Court has never dealt at length with the question of the constitutional significance of a statutory tenure system, this Court has accorded substantive First Amendment protections to teachers who had not achieved tenure under applicable state law. See, e.g., *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Shel-*

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[5]This Court has noted that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U. S. 479, 487 (1960). *See also Wieman v. Updegraff*, 344 U. S. 183, 195 (1952) and *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

[6]This Court has rejected the proposition that public employees, including teachers, may be asked to surrender fundamental First Amendment rights as a condition of public employment. *See, e.g., Wieman v. Updegraff, supra; Pickering v. Board of Education, supra. See also*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

ton v. Tucker, 364 U. S. 479 (1960). The University does not dispute the proposition that the First Amendment places limitations on its power to terminate non-tenured as well as tenured professors.[7]

However, in refusing to extend procedural protections to non-tenured professors, the University has relied on the principle that government employment in the absence of legislation can be revoked at the will of the appointing officer. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 896 (1961); *Vitarelli v. Seaton*, 359 U. S. 535, 539 (1959). Such cases involving employees other than university professors must be read in conjunction with the line of cases that has extended procedural protections to teachers where none were provided under state law. See *Connell v. Higginbotham*, 403 U. S. 207 (1971); *Slochower v. Board of Higher Educ.*, 350 U. S. 551 (1956). *Cf. Bell v. Burson*, 402 U. S. 535 (1971).

The applicability of minimal due process reqirements depends upon a balancing of the private and public interests involved. See *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970).

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[7]This concession that the First Amendment does not distinguish between teachers on the basis of their tenure status when the [substantive] protection of First Amendment rights . . . is the issue, . . ." see Petitioners' Brief at 20, is significant in light of the pendency of *Perry v. Sindermann*, No. 70-36. In *Perry* this Court is being asked to resolve the conflict between the Tenth Circuit which has held that, unless statutes or contracts provide to the contrary, non-retention decisions may be made for any and all reasons, including First Amendment activities, and every other Circuit which has spoken on the question of the substantive First Amendment rights of non-tenured teachers. *Compare, Jones v. Hopper*, 410 F. 2d 1323 (10th Cir. 1969), *cert. denied*, 397 U. S. 991 (1970) with *McLaughlin v. Tilendis*, 398 F. 2d. 287 (7th Cir. 1968); *Pred v. Board of Public Instruction*, 415 F. 2d. 851 (5th Cir. 1969); *Drown v. Portsmouth School Dist.*, 435 F. 2d. 1182 (1st Cir. 1970), *cert. denied*, 402 U. S. 972 (1971); *Orr v. Trinter*, 444 F. 2d. 128 (6th Cir. 1971), *petition for cert. filed*, 40 U. S. L. W. 3081 (U. S. August 18, 1971) (No. 71-249); *Freeman v. Gould Special School Dist.*, 405 F. 2d. 1153 (8th Cir.) *cert. denied*, 396 U. S. 843 (1969).

Where fundamental First Amendment values are at stake, this Court has fashioned procedural rules designed to protect such values. See *Speiser v. Randall*, 357 U. S. 513 (1958). "[F]reedoms of expression must be ringed about with adequate bulwarks." *Blount v. Rizzi*, 400 U. S. 410, 416 (1971). See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). *Cf. United States v. Robel*, 389 U. S. 258, 281-282 (1967) (Brennan, J., concurring). Such procedural devices go beyond the personal interests of the parties involved and look to the community interest in continued free and vigorous debate.

In affirming the District Court, the Seventh Circuit ruled that the university must "initially shoulder the burden" of providing the professor with the reasons for the non-retention decision and of exposing such reasons to a limited test at a hearing. (A. 178) Absent such procedural requirements, non-tenured professors dissatisfied with their non-retention would have no recourse but to seek judicial relief.

The University, on the other hand, relies heavily on the existence of judicial forums to justify its refusal to provide non-tenured professors with minimal due process.[8] However, where important interests are at stake, the existence of judicial or administrative remedies has not pre-

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[8]The University correctly suggests that courts are more adept than university administrators at deciding difficult constitutional questions. Petitioner's Brief at 16. Reliance on this point, however, misconstrues the reason for providing minimal due process. By giving non-tenured professors a statement of reasons and an opportunity for a hearing, the university may be able to resolve many non-retention disputes *without* court action. In any event, the university is surely qualified to evaluate "academic" reasons for non-retention. Finally, where factual disputes exist as to the accuracy of the reasons for a proposed non-retention, a prompt administrative resolution should be in the university's as well as the professor's interest.

vented this Court from requiring the states to develop procedural protections better suited to safeguard such values. "'The fundamental requisite of due process of law is the opportunity to be heard.' . . . The hearing must be at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U. S. 254, 267 (1970). See also, *Snaidach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Escalera v. New York City Housing Authority*, 425 F. 2d. 853, 864 (2nd Cir. 1970), *cert. denied*, 400 U. S. 853 (1971).

Notwithstanding its reliance on the availability of judicial forums, the University refuses to make available the statement of reasons which would enable a non-tenured professor to make a reasoned decision as to whether he will challenge a non-retention decision. Since the reasons for non-retention would be available through discovery after an action was commenced, it is difficult to understand why such reasons could not be furnished initially to all teachers when advised of a proposed non-retention.

At one point, the university has suggested that the administrative remedies required by the District Court and affirmed by the Seventh Circuit will not effectively protect First Amendment Rights which can only be protected in the Courts. Petitioner's Brief at 16-19.[9]

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[9]Apparently petitioners assume that universities will determine these minimal procedural protections by wilfully failing to provide non-tenured teachers with the true reasons for the non-retention.

Where the stated reasons are sham and where the ultimate decision maker is not impartial, the chances of the non-tenured teacher achieving a successful administrative resolution of his dispute may be slim. However, even in such cases the receipt of reasons would assist the teacher in "exposing any retributive effort infringing on . . . academic freedom. . . ." *Drown v. Portsmouth School Dist.*, 435 F. 2d. 1182, 1184 (1st Cir. 1970) *cert. denied*, 402 U. S. 972 (1971); *Cf. Johnson v. Branch*, 364 F. 2d. 177 (4th Cir. 1966), *cert. denied*, 385 U. S. 1003 (1967).

(Continued on next page)

Such reasoning ignores the fact that few professors, faced with non-retention decisions, will seek judicial relief. Litigation and the attendant public exposure may be costly both in terms of money and personal embarrassment. Moreover, without a statement of reasons, the professor has only two alternatives: quietly acquiesce in the non-retention or begin a major law suit based on his suspicion that the reasons behind the non-retention were constitutionally impermissible.

This lack of a sensible middle alternative poses the danger of non-retention decisions being made on impermissible First Amendment grounds without professors having effective means of acting to protect their interests. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Speiser v. Randall*, 357 U. S. 513, 526 (1958).

(Continued from last page)
Despite the suggestion that the minimal procedures will provide only an illusory safeguard for teachers, the National Education Association, the American Association of University Professors and the American Federation of Teachers, the three major organizations representing teachers, have taken a contrary view and have submitted briefs as amicus curiae either in this case or in *Perry v. Sindermann*, No. 70-36. Respondent suggests that these organizations have a greater claim to speak for teachers than do petitioners.

B. *Because The Reasons For His Non-Retention Implicated First Amendment Rights, Roth Was Entitled To Minimal Due Process.*

The facts of this case required that Roth be provided with a statement of the reasons and an opportunity for a hearing before the non-retention decision could be made.

In Wisconsin, non-tenured state university professors faced with non-retention decisions are not provided minimal due process. Typically, the university notifies the professor that his contract will not be renewed. No reasons are offered by the University and none will be provided; nor is the professor provided with an administrative hearing at which he can contest either the factual basis of the decision or the reasoning behind it. (A. 121-122)

Such decision may, in fact, rest totally or partially upon the professor's First Amendment activities. Roth, for example, was charged with having violated several minor university rules and for making "public statements . . . that indicate[d] a very unscholarly approach to the truth and the search for knowledge . . . ," (A. 127) These charges were contained in a memorandum to defendant Guiles, the President of the University, who then made his decision for non-retention entirely on this memorandum and the recommendations provided to him, "without making a personal investigation of the facts, and without substituting my judgment for that of the vice president of academic affairs and the dean." (A. 123)

Had Roth been provided with the statement of reasons contained in the memorandum and in the recommendation of the Tenure Committee and with an opportunity for a hearing on these reasons, the non-retention decision

may have been reversed. For each of the non-First Amendment reasons contained in the memorandum recommending his non-retention, Roth had either a full or a partial answer. (A. 137-145)

The facts surrounding Roth's non-retention illustrate the need for at least minimal due process, including a statement of the reasons and a hearing, in reaching non-retention decisions. However, the Seventh Circuit suggested an alternative holding by pointing out that the First Amendment controversy in which Roth was involved presented a narrower basis for extending the protection of minimal due process in the present case only.

> "The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (A. 181)

Respondents believe that the true "prophylactic" effect desired by the Seventh Circuit can only be accomplished by extending procedural due process to all non-tenured teachers, irrespective of whether there exists a "background of controversy and unwelcome expressions of opinion." Such an approach would avoid a *post hoc* determina-

tion that would require universities to pick and choose among their non-tenured teachers in determining what kind of procedures, if any, are to be provided. Such an approach would also permit the courts to forego a case-by-case examination of the facts in order to determine whether a hearing should have been granted. See Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L. J. 841, 874-879.

In any event, were this Court to decide not to reach the broader issue of whether minimal procedural rights should be extended to all non-tenured professors faced with non-retention, the facts herein clearly support the decision to require a statement of reasons and a hearing.

Unlike the situation in which the decision for non-retention rests upon subtle and difficult to articulate reasons, the reasons in this case involved alleged violations of university rules and regulations and were, in fact, articulated in a detailed memorandum prepared for the convenience of the decision maker. The burden on the university of providing Roth with a copy of such reasons and an opportunity for a hearing was minimal. See *Goldberg v. Kelly,* 397 U. S. 254 (1970). Moreover, in light of the remarkable candor of the memorandum and the abrupt change in position of the Tenure Committee, it was incumbent on the University President, defendant Guiles, to extend minimal due process to Roth in order to insure that the persons making the non-retention recommendation had not either inadvertently or wilfully relied on Roth's protected activities.

II. THE PROCEDURAL DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT REQUIRES THAT DECISIONS NOT TO RETAIN NON-TENURED PROFESSORS BE ACCOMPANIED BY MINIMAL DUE PROCESS.

As discussed in the preceding section, the record in the present case demonstrates that safeguarding essential First Amendment expression required that Roth be accorded minimal due process, including a statement of reasons and hearing, prior to the decision not to retain him as a state University professor. Independent of such First Amendment considerations, the Due Process Clause of the Fourteenth Amendment also requires that non-tenured professors at state universities be given minimal due process when a non-retention decision is made.

This Court has held that where the government proposes action which would seriously injure a person it must be accompanied by procedures which accord that person at least minimal or rudimentary due process. *Goldberg v. Kelly*, 397 U. S. 254 (1970). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Munzo*, 380 U. S. 545, 552 (1965). This Court has observed that "relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as . . . to discharge from public employment," *Goldberg v. Kelly*, 397 U. S. at 262.

The extent to which procedural due process must be provided a non-tenured professor faced with non-retention is "influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether . . . [his] interest in avoiding that loss outweighs

the governmental interest in summary adjudication." *Id.* at 263. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961).

Unless the university can show the existence of substantial governmental interests which are jeopardized by the lower courts' requirements of a statement of reasons and an opportunity for a hearing on the non-retention, such minimal due process rights should be provided. *Cf. Parker v. Lester*, 227 F. 2d 708, 718 (9th Cir. 1955).

A. *Non-Tenured Professors Have A Substantial Interest In Receiving A Statement Of Reason And A Hearing When A Decision Not To Retain Them Is Made.*

In striking the balance necesary to determine whether the requirements of procedural due process entitle a non-tenured professor to the safeguards of a statement of reasons and an administrative hearing when a decision not to retain him is made, the Courts below identified two non-First Amendment[10] interests of non-tenured professors in addition to their interest in retaining their jobs which are threatened by the university's summary procedure.

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[10] A non-tenured professor's interest in avoiding a non-retention decision based on the exercise of First Amendment rights is discussed in this Brief, *supra*, at pp. 13-21.

(1) Freedom From Arbitrary Non-Retention

The non-tenured professor has an interest in not having a non-retention decision based upon reasons that are arbitrary and capricious in violation of the substantive protections of the Fourteenth Amendment. In concluding that "substantive constitutional protection for a university professor against . . . arbitrary non-retention is useless without procedural safeguards," (A. 166) the District Court stated that "the decision not to retain a professor employed by a state university may not rest on a basis wholly without reason." (A. 165)

"The protection of the individual against arbitrary action . . . [is] the very essence of due process." *Slochower v. Board of Higher Educ.*, 350 U. S. 551, 559 (1956). As this Court stated in *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952):

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to a public servant whose exclusion pursuant to a statute is patently arbitrary."

These principles are equally applicable where the non-retention is patently arbitrary pursuant to an administrative decision.

Respondents do not propose to attempt to define the precise standard to be used to determine what constitutes a violation of the substantive protections of the Fourteenth Amendment's Due Process requirement. Such determination must await a case-by-case development. *Cf. Pickering v. Board of Educ.*, 391 U. S. 563, 574 (1968). However

there must be *some* reasons for non-retention which are so "wholly without support" that reliance on them constitutes a violation of the limited test proposed by the District Court. See, *e.g., Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957); *Thompson v. City of Louisville,* 362 U. S. 199 (1960); *Drown v. Portsmouth School Dist.,* II, — F. 2d. — (1st Cir. December 1, 1971) (Slip Op.).

(2) Injury to Professional Reputation

This Court has held that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U. S. 433, 437 (1971). Such considerations are particularly relevant where a person's ability to pursue his career are at stake. See, e.g. *Willner v. Committte on Character & Fitness,* 373 U. S. 96 (1963); *Birnbaum v. Trussell,* 371 F. 2d. 672 (2nd Cir. 1966).

In discussing the consequence of non-retention on a non-tenured professor's career, the District Court observed that:

> "There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him [of a non-retention decision] probably will be serious and prolonged and possibly will be severe and permanent. 'Badge of infamy' is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." (A. 165)

In Roth's case, the danger to his professional reputation was caused not only by the non-retention decision but also by the reasons for such non-retention. Roth was not terminated for subtle, difficult to articulate reasons. Rather, the University relied on alleged breaches of University rules including misuse of class time and defiance of University administrators. (A. 125-127) In addition, he was said to have exhibited an "unscholarly approach to the truth and the search for knowledge that make[s] it doubtful [that] he has the quality of scholarship desirable in a faculty member." (A. 127) Respondents suggest that here, where the reasons for non-retention call into question not only the desirability of retaining the individual professor at the university but also his fitness to continue as a professor, it is essential to extend the protection of minimal due process.

On the other hand, if the reasons for non-retention do not question his teaching qualifications, it is equally important that he be furnished a statement of these reasons to avoid any negative implications as to the circumstances of his termination. See *Birnbaum v. Trussell*, 371 F. 2d. 672, 679 (2nd Cir. 1966).

B. *There Are No Substantial Governmental Interests Which Justify the Refusal to Provide Statements of Reasons and Hearings.*

In concluding that the University was constitutionally required to provide non-tenured professors with minimal due process, the District Court carefully considered the University's interest in maintaining a quality faculty. The Court recognized that this interest has been served by a

fairly lengthy probationary period followed by tenure status, and found that it is not adversely affected by requiring that reasons and a hearing accompany decisions not to retain non-tenured professors.

Requiring a written statement of the reasons in the instant case would impose no significant burden on the University. See *Drown v. Portsmouth School Dist.*, 435 F. 2d 1182, 1185 (1st Cir. 1970). Even where the reasons for non-retention are somewhat more subtle than those contained in the Darken memorandum, it is not unreasonable to require that they be furnished. The reasons need not be stated with precision nor need they be demonstrated with particularity. (A. 164-165) What is required is that they be honestly stated and that they not be "entirely arbitrary and capricious." *Drown v. Portmouth School Dist II*, — F. 2d. — (1st Cir. Dec. 1, 1971) (Slip Op.); *Wieman v. Updegraff*, 344 U. S. 183 (1952).

Having been furnished with a statement of the reasons it is essential that the professor be provided with an opportunity to explore and respond meaningfully to these reasons. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). See also, *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Greene v. McElroy*, 360 U. S. 474 (1954).

It is not necessary that the hearing be a formal proceeding. It must minimally prevent "summary dismissal from public employment without hearing or inquiry required by due process." *Connell v. Higginbotham*, 403 U. S. 207, —, 91 S. Ct. 1772, 1773 (1971). See also *Slochower v. Board of Educ., supra. Cf. Nostrand v. Little*, 362 U. S. 474 (1960); *Speiser v. Randall*, 357 U. S. 513 (1958).

It cannot be denied that minimal due process requires some additional effort by the administrators. It is not unduly burdensome to require that such minimal considerations be given to a professor whose employment is being terminated.[11] At Wisconsin State University-Oshkosh, for example, of four hundred forty-two non-tenured professors, four were not renewed during the 1968-1969 academic year.[12] (A. 124) Even if each professor had requested a written statement of reasons and the opportunity to be heard, the University's interest in careful, yet reasonably expeditious decisions would not have been jeopardized.

C. *The Distinction Between Tenure and Lack of Tenure was Preserved By The Courts Below.*

Because the District Court held that a non-retention decision must be accompanied by minimal due process, it has been argued that the distinction between tenured and non-tenured status will be ignored by university administrators (Petitioners' Brief at p. 16). The District Court, aware of the distinction between tenure and lack of tenure, carefully preserved the *substantive* difference between them

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[11]At least 18 states do extend some minimal procedures to non-tenured teachers in either higher or elementary and secondary educational systems. See National Education Association Brief as Amicus Curiae in *Perry v. Sindermann*, No. 70-36, at 19. In Wisconsin, elementary and secondary school teachers are given notice and the right to a conference before the school board before a non-retention can be made. See § 118.22, Wis. Stats. (1969). This is commonly accompanied by a prior statement of the reasons. *See Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W. D. Wis. 1970).

[12]Petitioners' Brief at 18, n, 11, cites Circuit Judge Duffy's dissenting opinion (A. 185) as authority for the fact that 206 non-tenured teachers at the prior State University systems, which consisted of ten four-year and a number of two-year institutions, had not been renewed. This figure was not in the record at any stage of the proceedings herein and first appeared in Appellants' Brief to the Court of Appeals, p. 23, n. 13.

while requiring minimal *procedural* safeguards for the non-tenured professor.

The District Court clearly stated that the "standard [for non-retention of a non-tenured professor] is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (A. 165-166). See, *State ex rel. Ball v. McPhee*, 6 Wis. 2d. 190, 94 N. W. 2d. 711 (1959); See also Developments—Academic Freedom, 81 HARV. L. REV. 1045, 1904-1099 (1968). Thus, the requirement that university administrators provide non-tenured professors with minimal due process does not in itself place any substantive limitations on their power to hire and fire non-tenured professors. Finally, to suggest that universities will only employ "homogonized mediocrities" (see Petitioner's Brief, at p. 22) if minimal due process is required, is to question both the competence and good faith of university administrators.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully Submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for the Wisconsin Education Association as Amicus Curiae

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Interest of the *Amicus Curiae*

David Roth, a "non-tenured" professor of political science employed by a government controlled and operated university, has challenged the summary termination of his employment. It is his position, and that of the Wisconsin Education Association (WEA), that when his employment was terminated by government action without his being given notice of the reasons for such action, and without his being accorded opportunity

to contest it, David Roth's constitutionally secured rights to substantive and procedural due process of law were denied.

The WEA has been in existence since 1853; it was incorporated by special act of the Wisconsin Legislature in 1855. Among the WEA's current 44,000 members are found professors and teachers employed in every kind of educational institution operated by government in Wisconsin. These educators are subject to a variety of customary practices and statutory provisions under Wisconsin law which provide or deny protection for their interests and rights when they would face loss of their employments.

WEA members who are professors employed by the State universities at Green Bay, Kenosha-Racine, Madison and Milwaukee may acquire, as a matter of custom and practice, a certain tenure status following employment for a period normally of three years. Those employed by other State universities may acquire a statutorily provided tenure status following a five-year probationary employment period. Sec. 37.31, Wis. Stat. (Prior to its amendment by ch. 233, Wis. Laws (1969), this same statute section provided for a probationary period of only three years.) WEA members who are employed by the State as teachers at its institutions for the retarded and handicapped are entitled to the protections of the State civil service system, see sec. 16.24, Wis. Stat., following a six-month probationary employment period. Sec. 16.22, Wis. Stat.

The majority of WEA members are employed as teachers by the public elementary, secondary and vocational school districts which are provided for by Wisconsin law and blanket the State. The great majority of these educators never acquire any tenure status, for under Wisconsin law a statutory tenure status is available only to public school teachers employed in Milwaukee

County, following a probationary period of three years. Sec. 118.23, Wis. Stat. All that the State statutes provide for a public school teacher not employed in Milwaukee County, when his employment would be terminated, is a "conference" with his employer. Sec. 118.22, Wis. Stat.

At stake in this case is the interest of a free society in seeing that the educators of its children are accorded the same respect at the hands of government and the same rights to substantive and procedural due process of law that constitutionally are secured to every citizen under our system. The WEA appears as an *amicus curiae* before this Court to oppose government employers who, unmindful of the elementary prerequisites of a free society, would act summarily to recklessly and arbitrarily injure professors and teachers by termination of their employments.

Issue Presented for Review

The issue presented for review in this case is whether, under our system, government will be permitted to act against a class of citizens to injure them, recklessly and arbitrarily, in a summary manner.

Argument

IT IS CONTRARY TO THE BASIC CONSTITUTIONAL REQUIREMENT THAT GOVERNMENT PROTECT AND PRESERVE OUR CHERISHED FREEDOMS TO PERMIT GOVERNMENT TO INJURE THE INDIVIDUAL BY ARBITRARILY AND SUMMARILY TERMINATING HIS EMPLOYMENT.

A. *Introduction.*

In this day and age when government terminates a man's employment against his will it severely injures him. When such

termination of employment by government is done arbitrarily, all society as well as the individual concerned is injured.

It is a truism that our cherished freedoms under this system of government survive only to the extent that the dignity, worth and value of the individual is protected. American democracy was conceived in the belief that ordered liberty survives only as this dignity and value is maintained. Throughout our history Americans have been called upon to protect and preserve this fundamental precept in a variety of ways and under various conditions of stress and sacrifice; some have given their lives in war; some have suffered immense personal hardships and deprivations in the fight against suppression of our liberties by unjust laws; but all has been justified because preservation of the dignity of every human being counted for something.

At stake in this case is not the continued employment of Roth; not the recognition of a "tenure" system; not the ability of a university to select qualified people; and not the convenience of government administrators. At stake in this case is the interest of a democratic people in the preservation of the concept that government must treat its people fairly; the concept that when government takes action against an individual employed by it, the employee must not be dealt with in an arbitrary and capricious manner.

B. *Government's responsibility to protect the freedom and dignity of individuals requires that before it acts to the detriment of a person employed by it there be an appropriate reason and a basis in fact to support it.*

The courts below concluded that the State could not terminate David Roth's employment without an appropriate reason and a basis in fact to support the reason. Consistent with the importance

of individual freedom and dignity, how could the standard be anything less? Any lesser standard permits government to act arbitrarily. To permit government to act arbitrarily is to permit suppression of freedom. Arbitrary action by government degrades and humiliates the individual. Men subject to such government must respond as sheep or as revolutionaries. Allowance of a substantive rule requiring less of government than that recognized by the courts below would be inconsistent with the purpose of government under our system. There is no more reason to permit arbitrary action in government employment relations than there is in any other area of government activity.

C. *The arguments of government employers that they should be able to terminate an employee for no reason or one that has no basis in fact are without merit and inconsistent with the basic purpose of government.*

1. *The tenure argument.*

Government employers argue that recognition of the requirement of due process of law in the employment termination context is in effect a granting of tenure. This argument confuses the issue.

That the standard adopted by the lower courts may afford non-tenured teachers some fraction of state conferred tenure rights cannot outweigh the importance of requiring government to act not arbitrarily. Notwithstanding a legitimate governmental interest in securing high quality employees, it is more important to require government to act consistent with the basic purpose of preserving individual freedom and dignity than to allow government unfettered discretion in dealing with certain employees, in the name of preserving unduplicated practices that bear the label "tenure".

Moreover, under our system the existence of constitutionally secured rights does not depend on the rights to which an individual may or may not be entitled by reason of a state statute or custom. Were it otherwise, what would be the value of having a constitutionally based system of law? If the rights to due process were secured only to those educators who enjoyed some tenure status under state law, then the protection afforded by such rights could be deferred for any length of time, or denied altogether, depending on the will or whim of administrators or a legislature.

2. *The "burden upon administrators" argument.*

It is argued that the administrative determination to retain or release an employee is such a delicate one that administrators and educators will find it impossible to articulate reasons for the decision, and such a burden should not therefore be imposed. Again this argument is based on an erroneous premise.

In the private employment sector millions of employees enjoy the security of "just cause" provisions in their employment contracts. For decades private employers have been articulating their reasons for equally delicate decisions, and defending them in grievance and arbitration proceedings. We should be entitled to expect as much from public employers.

More importantly, this argument tends to give governmental expedience priority over the interests of the individual. Again it ignores our most cherished concepts in favor of maintaining an easy responsibility, or irresponsibility, for government decision-makers.

Finally, unless the action is totally arbitrary it is difficult to conceive of a case where, when there exists a lawful reason for the termination of an educator's employment, there would not

exist some factual basis which led an administrator to conclude the man's employment should be terminated. It is hard to believe that government administrators are as inarticulate, incapable and timorous, in those areas where they daily must make judgments, as the government arguments would paint them to be.

D. *Government's responsibility to protect and preserve the dignity and freedom of individuals requires that before government acts to the detriment of a person employed by it, he is entitled to fair notice and a fair hearing if he desires it.*

To insure that government does not act arbitrarily, it is indispensable that there be a procedure to test government's action. Procedural due process seeks to assure that government will not act at odds with its basic purpose. The procedural requirements defined by the lower courts are designed to avoid arbitrary action. Within the overall range of procedural safeguards those adopted are minimal. In a country such as ours we certainly should accept nothing less.

E. *The arguments of government employers that they should be able to terminate the employment of non-tenured professors without giving notice of the reasons or opportunity for hearing are without merit and inconsistent with the basic purpose of government.*

1. *The inconvenience argument.*

It is contended that notice giving and hearing participation are burdensome and inconvenient, especially for governmental agents who work only part-time in that capacity or who are inexperienced in such matters. To the extent there may be truth in this proposition, it is again no reason to subvert the procedural rights of the individual employed by government. Throughout

the course of our national history procedural due process has been the guarantor of substantive rights. Where the issue is a defective bathtub, or which auto had crossed over the center-line before the collision, our citizens are afforded highly complex procedures for adjudication of their rights. The burden of such procedures on government has not caused them to be abandoned.

Here the implication is that government is somehow in a position where it is inconvenient for it to serve its most basic purpose. While loss of employment, with all its incidental damage to the individual, should warrant much greater procedural protection, government employers argue that even a minimum is too much.

In these times it is essential that our courts keep our populace from losing sight of the governmental attitudes and values which have historically set us apart from other systems of government. Such values and attitudes do not permit sacrifice of procedural due process of law for governmental convenience.

2. The "illusory" argument.

In support of reversal of the lower courts it has been contended that the due process standards set forth are "illusory" and meaningless. It is argued that, where a government employee insists on these rights, the government employer can easily find, or even fabricate, a reason for which there is some basis in fact, give notice of the same and an opportunity to be heard. In all probability, the employee would still lose his job.

In making that contention the government employers fail to understand that the real issue is not whether or not an individual retains or loses his job. The issue is whether or not government will be required in this context to afford the individual the basic fairness that is so essential to individual dignity and freedom.

Such fairness does not require that every employee keep his job; it only requires that government not act arbitrarily. To say that government will attempt to evade this responsibility evidences a degree of cynicism which we do not share. Moreover, the guarantee of a fair hearing would tend to minimize such attempts. In the long run, the requirements of fairness should breed respect for our system and tend to foster individual freedom.

Again, what is at stake is not whether a man retains or loses his job. It is our most precious heritage that is at stake. We cannot permit government to treat persons arbitrarily. If we permit this to occur we have a system which authorizes the government administrator to act at will to deny the exercise of freedom to those affected. The standards set by the court below are anything but "illusory". Without such rules we not only jeopardize our freedom, we breed a disrespect for our system by permitting it to operate arbitrarily and contrary to the way our citizens believe it should operate.

F. *Conclusion.*

Where government is permitted to act arbitrarily in its relationship with an individual it is acting contrary to the basic purpose for which it was created. The WEA asks that this Court affirm the decisions of the courts below and require that government accord David Roth both substantive and procedural due process of law.

Respectfully submitted,

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No. 71-162

BOARD OF REGENTS OF STATE COLLEGES, et al., *Petitioners*,

v.

DAVID F. ROTH, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES, et al, *Petitioners,*

v.

DAVID F. ROTH, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND ROBERT P. SINDERMANN, AMICI CURIAE

Interest of the Amici Curiae

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of more than one million professional educators, many of whom are non-tenured teachers in public educational institutions, both at the higher education and elementary and high school levels.

One of NEA's primary purposes is to protect the constitutional rights and academic freedom of teachers. To that end, NEA has participated as *amicus curiae* in numerous cases where these values were at stake, and has conducted surveys throughout the United States to determine the extent to which these values are being preserved. NEA has acquired a nationwide perspective, based upon its experience, which it believes will be of assistance to the Court.

Robert Sindermann is the respondent in *Perry* v. *Sindermann*, No. 70-36, a case which has been set for oral argument with the instant case, and which raises issues similar to those presented here.

The brief for petitioners in the instant case, as well as the briefs filed by *amici* supporting petitioners, advance a number of arguments against affording hearings to non-tenured teachers facing non-renewal—arguments not advanced by the petitioners in *Sindermann* and accordingly not discussed in the briefs filed in that case by Sindermann and NEA. NEA and Sindermann file this *amicus* brief to present their views on these newly-advanced arguments.

SUMMARY OF ARGUMENT

The teacher's right to a statement of reasons and a hearing prior to non-renewal derives from two constitutional sources: the First Amendment, and the due process clause of the Fourteenth Amendment.

1. History and a burgeoning federal caseload reveal that non-renewals frequently are prompted—as they were both here and in *Sindermann*—by teacher activities which at least arguably are protected by the First Amendment. When teachers can receive a non-renewal notice without being told the reasons, and without a hearing, few will be bold enough to speak out on controversial issues especially if such speech is critical of the authorities who will decide their future employment. A principal purpose of the First Amendment is to assure that society will receive those views. When teachers fear to speak, society loses the important contribution which they can make on issues of public significance, particularly their suggestions for improving the way public educational institutions are run.

Petitioners acknowledge that teachers may not be denied renewal for exercising their First Amendment rights, but they insist that an adequate remedy exists—the opportunity

to bring a lawsuit under 42 U.S.C. § 1983. In reality, that remedy does not remove the "chilling effect" of the threat of summary termination. The costs of litigation, and the real danger that the teacher who sues will brand himself too controversial to secure other employment, will deter most teachers from using that remedy. And even where it *is* invoked, the terminated teacher must endure severe hardship while awaiting a decision, and his fellow teachers will have learned that job loss is the price for advocacy.

"The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against with sensitive tools." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967). Procedures affording teachers a statement of reasons and a pre-termination hearing furnish an essential buffer between advocacy and job loss—a buffer which will remove that chilling effect. Hypothetically, these First Amendment interests could be served by requiring hearings only in those cases where a teacher's non-renewal is contemplated, at least in part, because of speech or conduct arguably protected by the First Amendment. Realistically, however, such a scheme would be insufficient; for the school bent upon ridding itself of a teacher for expressing unpopular views would then be tempted to conceal its true purpose in order to escape the obligation to provide a hearing; and teachers, knowing this to be the case, would fear to speak out on controversial issues. Only by furnishing a statement of reasons and a pretermination hearing in all non-renewal cases can the First Amendment interests be adequately protected.

2. This Court has repeatedly emphasized that where the State proposes to interfere with "important interests" of the citizen it must first provide procedural due process. This doctrine constitutes a second, wholly separate, source of hearing rights for teachers. As petitioners recognize, the teacher's right to procedural due process turns upon the balancing test enunciated in *Cafeteria Workers* v. *McElroy,*

367 U.S. 886 (1961), i.e. upon weighing the teacher's interest in retaining his job against the State's interest in summary adjudication.

The teacher's interests are clear. Non-renewal deprives the teacher and his family of their sole source of income, and terminates that association with colleagues and students which plays a major part in the teacher's enjoyment of his career. Moreover, the non-renewed teacher, unless he elects to abandon his career, inevitably must bear the cost of relocating—he and his family must move to a new city, find new housing, make new friendships, and start a new life. Finally, empirical evidence demonstrates that in the academic world non-renewal frequently spells the end of a teacher's career —the stigma of non-renewal renders the teacher unemployable.

The asserted countervailing State interests all stem from a misunderstanding of what a due process hearing entails. It does not alter the substantive grounds upon which the State may premise non-renewal. Such factors as mediocrity, incompetency, the availability of better qualified personnel, reduction in teaching force, and shifts in curriculum remain valid grounds for non-renewal, irrespective of whether a right to hearing exists. Nor does a hearing impose a burden upon the State to "prove" its grounds for non-renewal. The function of the hearing is to enable the teacher to be heard before he suffers a severe injury, not to create a forum in which the State must "prove" its reasons. Thus, in terms of both substance and the burden of proof, the distinction between tenured and non-tenured teachers would be preserved. Hearings will not impose unmanageable administrative burdens upon the State, as demonstrated by the growing number of States (including both Wisconsin and Texas, where petitioners here and in *Sindermann* are located) which provide them by statute to elementary and high school teachers threatened with non-renewal. A recent study in the State of Washington, where non-renewal hearings are pro-

vided by statute, confirms that the administrative burden is minimal. Other objections advanced by petitioners and the *amici* supporting petitioners are likewise invalid, as we show in the Argument.

Furthermore, in assessing the State's interest, recognition must be given to the important public benefits which hearings would provide. The public has an interest in the retention of superior teachers, an interest which is threatened when—as here and in *Sindermann*—non-renewal is predicated upon grounds unrelated to teaching caliber. Hearings increase the likelihood that superior teachers will not be terminated unwisely. Hearings also will reduce the enormous burden which non-renewals today place upon the judiciary, by diverting such cases from the courtroom to the campus. Hearings will convince the State in some instances that non-renewal would be unjustified, and in others they will convince the teacher that non-renewal *is* justified, and that litigation is unwarranted. Hearings will also promote accountability of public officials, and assure that decisions are made intelligently and fairly. Finally, the hearing process will remove teacher's fears of speaking on public issues, a gain of inestimable value to the public.

In sum, the *Cafeteria Workers* balance tips heavily in favor of according statements of reasons and hearings to teachers prior to non-renewal.

ARGUMENT

INTRODUCTION

This case presents a classic illustration of the need for notice and hearing prior to the non-renewal of faculty members. A campus riot occurs, and the University summarily suspends 94 black students who were arrested in the riot. Roth, a young, non-tenured Associate Professor of Political Science, is outspokenly critical of the University's handling of the incident, advocating that the students should not

have been suspended *en masse,* and that they should be reinstated subject to individual determinations of guilt. Thereafter, Roth is notified that his employment will not be renewed for the following year. He is neither told the reason for non-renewal nor offered a hearing. The University's file (obtained by Roth only after he sued) discloses that shortly before the decision not to renew (and following Roth's involvement in the black students controversy) the tenured members of his department prepared their written evaluation, rating him a superior teacher, and unanimously "highly recommend[ing]" his reappointment (App. 131-135). The Dean, however, submitted an extensive memorandum recommending that Roth *not* be renewed, and prevailed upon the tenured members to reconsider and withdraw their prior recommendation. One of the Dean's stated reasons was that Roth's criticism of the University's handling of the controversy—e.g. as "authoritarian and autocratic"—reflected "a very unscholarly approach to the truth and the search for knowledge that make it doubtful he has the qualities of scholarship desirable in a faculty member . . . [S]urely we can hire a replacement for Dr. Roth who will follow university policies in . . . demonstrating a greater respect for the truth" (App. 127, 129-130).

Against this setting, and the somewhat similar setting in *Perry* v. *Sindermann,* No. 70-36, this Court is called upon to determine whether, and to what extent, non-renewal must be preceded by notice and hearing. We discuss herein the two separate sources from which we believe the right to such procedural protections derives: from the First Amendment, and from the due process clause of the Fourteenth Amendment.

I. THE FIRST AMENDMENT RIGHT TO A HEARING

In this case, as in *Sindermann,* the record demonstrates that First Amendment considerations were implicated in the non-renewal. Roth was non-renewed, at least in part, because of his criticism of the University's handling of a stu-

dent riot. The NEA's experience, reflected in a growing volume of litigation, is that frequently decisions not to renew a non-tenured teacher's employment are prompted by teacher activities which at least arguably are protected by the First Amendment. NEA is aware of dozens of recently decided or pending cases in which Courts have determined or teachers have claimed that non-renewal was prompted by such activities, and these undoubtedly represent but a small fraction of the total number.[1] Moreover, studies confirm that throughout American history teachers have lost their jobs for advancing "unpopular" views (See NEA *amicus* brief in *Sindermann,* pp. 4-11). Only rarely, however, is a teacher told that it is his advocacy which has prompted his non-renewal (*Sindermann* is such a case). More often, as here, the authorities assert that they have no obligation to advise the teacher of the reasons for non-renewal, and no responsibility to provide a hearing.

In such an atmosphere, few non-tenured teachers will be bold enough to speak out on controversial issues, particularly when their views will be unwelcome to the authorities who will decide their future employment. Necessarily, the cases which come to this Court have involved those teachers — the Pickerings, Sindermanns, and Roths — who have spoken out despite the threat to their job security. From these examples, this Court may derive a mistaken notion that academic freedom is flourishing on American campuses. Regrettably, that is not the case, nor historically has it been.[2]

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[1] Many cases of which NEA is aware are listed in an Appendix to this brief.

[2] NEA *amicus* brief in Sindermann, pp. 4-11. In *Sindermann,* sympathetic fellow teachers were so intimidated by the College's hostility to Sindermann's activities that they feared even to substitute for him while he was absent to testify before the State legislature on their behalf (Brief for Respondent in *Sindermann,* pp. 4a, 7a). See also comment, Constitutional Rights of Public Employees: Progress Toward Protection, 49 N. C. L. Rev. 302, 314 (1971).

When teachers are silenced, the public is denied its "interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment," *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968). The manner in which public educational institutions are run "is a matter of legitimate public concern on which the judgment of the school administration . . . cannot . . . be taken as conclusive." (*Id.* at 571). Rather:

> "On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how [their institutions ought to be administered]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." (*Id.* at 571-572).

Petitioners, and the *amici* supporting petitioners, acknowledge that teachers may not be denied renewal for exercising their First Amendment rights. But they insist that an adequate remedy exists—the opportunity to bring a lawsuit under 42 U.S.C. § 1983. For most teachers that remedy is ephemeral. The outspoken teacher who is denied renewal without a statement of reasons can only guess whether his First Amendment activities have played a role in his job loss. He must decide to bring a lawsuit, incurring great personal expense, just to find out whether he has a cause of action. And even if he *knows* he has a meritorious lawsuit, the barriers to suing are substantial. Many teachers cannot afford to sue; others will fear to do so lest they brand themselves too controversial to secure other employment—the fate which befell Sindermann (See Brief for Respondent in *Sindermann*, pp. 9a-14a). All will suffer the economic hardship and social stigma of unemployment for the months or years until a legal decision is obtained. In the interim, the remaining teachers will have learned the lesson

that the price for advocacy is loss of employment. In sum, the availability of a § 1983 action following non-renewal does not remove the "chilling effect" upon academic freedom of the threat of summary termination. Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 Duke Law Journal 841, 859-860 (1970).

"The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against with sensitive tools." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967). Procedures affording teachers a statement of reasons for contemplated non-renewal, and an opportunity for a pre-termination hearing, furnish an essential buffer between advocacy and job loss. Few Universities will openly declare that they are contemplating non-renewal for the exercise of First Amendment rights.[3] A requirement that the reasons for non-renewal be disclosed, rather than shrouded in secrecy, may deter non-renewals so motivated. To be sure, the danger exists that pretexts will be used to camouflage impermissible non-renewals; but surely most university administrators would pause before stooping to such tactics, and the hearing provides a forum in which those who do use pretexts may be exposed. Finally, in situations where a teacher's conduct falls close to the balance line struck in *Pickering,* the hearing affords the teacher a full exploration, prior to non-renewal, of whether his activities are protected by the First Amendment. Precisely because of these prophylactic effects, the right to hearing is an essential bulwark against the stifling of academic freedom. *Speiser* v. *Randall,* 357 U.S. 513 (1958).

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[3] As reflected in the *amicus* brief for The American Council on Education, et al. (page 5), most colleges are committed to functioning as "havens of unfettered discussion . . . a refuge where new concepts can be discussed and developed free from the social constraints which often inhibit discussion in the world of business and government." Such colleges are unlikely to deny renewal for engaging in "unfettered discussion" if the reason for non-renewal must be disclosed.

Hypothetically, these First Amendment interests could be satisfied by requiring hearings only in those cases where a teacher's non-renewal is contemplated, at least in part, because of speech or conduct arguably protected by the First Amendment. Realistically, however, the protection afforded by such a scheme would be insufficient, for the school bent upon ridding itself of a teacher for expressing unpopular views would then be tempted to conceal its true purpose in order to escape the obligation to provide a hearing; and teachers, knowing this to be the case, would fear to speak out on controversial issues. The only way to protect adequately the First Amendment rights of teachers is by affording a statement of reasons and an opportunity for a pretermination hearing in *all* non-renewal cases. That this means hearings will be required in cases which ultimately prove to be wholly without First Amendment implications does not make the procedure overbroad: regulation of an entire field in order to assure against injuries in particular instances which would result from non-regulation is a common device in American jurisprudence. See, e.g., *Smith* v. *California,* 361 U.S. 147, 152-154 (1959); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 329 (1966); *North American Co.* v. *S.E.C.,* 327 U.S. 686, 710-711 (1946); *Assigned Car Cases,* 274 U.S. 564, 582-583 (1927). The key to the propriety of such an across-the-board approach is a determination that—as here—the evil cannot be protected against by a narrower approach. *Ibid.*

In any event, the right to a hearing is clear in this case even if the Court were to take a narrower view. Here it was apparent, when Dean Darken submitted his recommendation to the University President, that Roth's arguably protected activities were among the reasons for the recommendation. Thus, the President, before acting upon the recommendation, should have notified Roth of the proposed action and the reasons therefor, and afforded him an opportunity to be heard. No such hearing having been af-

forded, the non-renewal contravened the First Amendment. The same result is dictated in *Sindermann,* where the College openly stated that Sindermann's arguably protected activities were a cause of his non-renewal, but afforded him no hearing.[4]

II. THE DUE PROCESS RIGHT TO A HEARING

There is a second constitutional source of the teacher's right to a hearing when facing non-renewal of his contract: the Due Process Clause of the Fourteenth Amendment. This Court has repeatedly emphasized that where the State proposes to interfere with "important interests" of a citizen it must first afford him procedural due process. See, e.g. *Bell* v. *Burson,* 402 U.S. 535, 539 (1971). As petitioners recognize, the application of that principle to this case turns upon the balancing test enunciated in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), i.e. upon weighing the teacher's interest in retaining his job against the State's interest in summary adjudication. Petitioners' evaluation of those comparative interests, however, leaves much to be desired.

A. The Teacher's Interest

Petitioners seek to minimize the effect of non-renewal upon the teacher: "In our view, the harm experienced . . . may . . . be expressed as inconvenience and the cost of relocating" (Brief for Petitioner, p. 20). "Inconvenience" seems a mild word to describe the hardships visited upon teachers and their families when deprived of their sole source of income. This Court has rather described one in such circumstances as being "drive[n] . . . to the wall," *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 341-42 (1969). Likewise, "inconvenience" fails to convey the loss of that association with colleagues and students which plays a major part in the teacher's enjoyment of his career. Apart from

[4] We have argued that free speech considerations emanating from the First Amendment dictate the right to a hearing. The same result can be derived from the Due Process Clause. Since speech is "liberty", it cannot be infringed without procedural due process.

such "inconveniences," as petitioners acknowledge, there is the "cost of relocating," which almost inevitably follows non-renewal in higher education. If Roth cannot teach at Oshkosh, either he must abandon his career or he and his family must move to a new city, find new housing, make new friendships, and start a new life. Contrary to petitioners' assertion (Brief, p. 19) these hardships are scarcely "the same" as those suffered by the cook in *Cafeteria Workers*—who was offered another job by her employer in the same city.

The courts below emphasized the harmful effect which non-renewal has upon a teacher's professional reputation and ability to pursue his career. Petitioners concede (Brief, p. 19) that under *Cafeteria Workers* "if the discharge carries with it a stigma that would foreclose future employment opportunities, due process may require notice and hearing prior to discharge." But petitioners suggest that (*Id.*, p. 19):

> "Employment opportunities are more influenced by economic and enrollment trends than by the mere fact of non-renewal. We venture that in the academic community little or no significance is attached to a non-renewal."

This statement belies both common sense and the realities of the academic world. Roth was one of only 4 teachers not renewed by his University; 438 other non-tenured teachers *were* renewed (App. 124). Can there be any doubt that prospective employers will "attach significance" to that fact? And what will prospective employers be told when they inquire of Wisconsin State University as to Roth's performance there? That it was wholly satisfactory? Or, as is more likely, that it was deficient in the respects set forth in Dean Darken's recommendation—matters which Roth was given no opportunity to rebut? If the latter, can it credibly be asserted that prospective employers will not

"attach significance?" These harms track every non-renewed teacher at any time, but they are greatly magnified when, as now, there is a burgeoning teacher surplus at all levels of education.[5] As Dean Darken put it, "surely we can hire a replacement for Dr. Roth" free of his alleged infirmities (App. 129). Will not other prospective employers feel the same way? In a teacher-surplus market, why hire someone with a black mark against him?

In this instance, common sense is corroborated by the views of the experts in the field. The Chairman of the U.S. Civil Service Commission recently explained, "Being fired from government carries a stigma that prevents many employees from perhaps ever finding gainful employment again."[6] The stigma is especially great in the teaching profession, for the job is an unusually sensitive one, scrutinized closely by the public, and prospective employers will hesitate to hire another school's rejects. The Rhode Island Commissioner of Education has noted that in the academic world non-renewal is considered a "dismissal," and "dismissal [of a teacher] from his position, whether it be during a school year or at the end of a school year, can mean the end of his professional career."[7] A recent NEA survey found that 89.8% of elementary and high school systems allow a teacher to resign before formally notifying him of non-renewal, and 47% *affirmatively recommend* that the teacher resign[8]—a practice explicable only as a reflection

[5] NEA Research Div., *Teacher Job Shortage Ahead,* 49 NEA Research Bull. 69 (1971); Wolfle & Kidd, *The Future Market for Ph.D.'s,* Science, Vol. 173, p. 784 (August 1971).

[6] Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8.

[7] *Domenicone* v. *School Committee;* R.I. Commissioner of Education, May 20, 1970, pp. 3, 4.

[8] NEA Research Div., *School-Board Procedures Upon Non-Renewal of Teachers' Contracts* (Sept., 1971) (Research Memo 1971-72), reprinted in Brief of the NEA as *Amicus Curiae* in *Sindermann,* pp. 1a-8a.

that school authorities generally regard formal non-renewal as a barrier to future employability. Similarly, in higher education, it is "common administrative practice" to allow "a faculty member to resign and 'keep his record clean.'" Caplow and McGee *The Academic Marketplace,* p. 38 (Anchor Books edition, Doubleday & Company, New York, 1965). Finally, the actual experiences of non-renewed teachers in cases which have found their way to court confirm the serious impact of non-renewal upon employability. See Brief for Respondent in *Sindermann,* pp. 9-14a; Petition for Certiorari in *Orr* v. *Trinter,* No. 71-249, p. 4; *Lucia* v. *Duggan,* 303 F.Supp. 112, 116 (D. Mass. 1969).

Petitioners also argue (Brief, p. 12) that if teachers are accorded hearing rights upon non-renewal, the same rights inevitably must be accorded to all public employees. This does not follow at all. The problems of relocation which confront the non-renewed teacher are unique, and the impact upon the future employability of other types of employees is not necessarily as great as it is upon teachers. Moreover, because the teacher occupies a sensitive position subjected to close public scrutiny, he is more vulnerable to arbitrary pressures for employment termination than other civil servants. We express no view as to whether other public employees are entitled to hearings when threatened with job loss, but simply note that a decision that teachers have such rights does not automatically compel the same conclusion for others.

B. The State's Interest

Just as petitioners accord too little weight to the teacher's interest, they incorrectly weigh the State's interest: the State's interest in summary adjudication is unduly magnified, and the public interests which are *advanced* by the hearing process are wholly ignored. We discuss these factors herein.

(1) *The State's Interest in Summary Adjudication*

The "horrors" perceived by petitioners and the *amici* supporting petitioners stem largely from a misconception as to what a due process hearing would entail. We first outline briefly our conception of the minimal hearing procedures required by the Constitution, and then discuss the objections advanced.

The hearing process, to be meaningful, necessarily must begin with notification to the teacher that his non-renewal is contemplated and that he has a right to a detailed statement of the reasons therefor. The teacher must be afforded such reasons and an opportunity to be heard before non-renewal is effectuated (of course, the reasons and/or hearing need be provided only if the teacher wishes them). The teacher must be advised of all the evidence upon which non-renewal is contemplated. He must be permitted to present his arguments and evidence against that result, and accorded the right to confront and cross-examine those whose testimony or reports are said to furnish the basis for non-renewal. The ultimate decision must be based solely on the record made in the hearing.

As we explain more fully herein, this process does not require that the State have "cause"—in the sense required by State law for dismissing tenured teachers—in order to effectuate a non-renewal. Nor does it impose any "burden" on the State to "prove" that non-renewal is justified.[9] The constitutional command is merely that the teacher be afforded a fair and meaningful opportunity to be heard in his own behalf before serious injury is visited upon him.

With this introduction, we turn to the specific objections advanced by petitioners and the *amici* supporting petitioners.

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[9] The lone exception is where First Amendment considerations are involved. In such situations, the State has a burden of proving that the speech it seeks to condemn falls outside the First Amendment's protections. *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958).

(a) The Alleged Expansion of Federal Control Over the Grounds for Non-Renewal, and the Alleged Increase in Judicial Involvement in the Faculty Selection Process

The paramount concern of petitioners, and of the *amici* supporting petitioners, is that according procedural protections will lead to federal inroads upon the substantive freedom presently enjoyed by the State in making renewal decisions. As petitioners put it (Brief, p. 14):

> "Although the pivotal issue in Roth would seem to be procedural due process, this is, in fact, merely the opening of the door to judicial inquiry as to what constitutes an 'appropriate' reason for non-renewal.
>
> ". . . [T]hrough the vehicle of the administrative hearings the Courts, Federal as well as State, will be called upon to decide these matters on the merits by determining what satisfies the requirement of an 'appropriate' reason for non-renewal. The courts will be setting the criteria for the selection of the faculty and will, in fact, become the final arbiters . . .
>
> "Further, the courts by being called upon to pass on the sufficiency of the reason for non-retention will be directly involved in the selection of the faculty and the administration of the schools. The courts will not only be determining the criteria for the composition of the faculty, but will actually be selecting the faculty by affirming or reversing the administrative decision."

These fears are wholly imagined.

The federal Constitution already imposes certain limitations upon the State's freedom in non-renewal cases. The State may not predicate non-renewal upon the exercise of constitutional rights;[10] nor may it deny renewal for reasons

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[10] *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). See Brief for Respondent in *Sinderman*, pp. 17-20.

violative of the equal protection clause;[11] nor may its decision be "arbitrary," i.e. for reasons "wholly without [evidentiary] support"[12] or for reasons which bear no rational connection to the State's interests.[13] But these substantive limitations exist, and their transgression subjects the State to federal judicial intervention, irrespective of whether there is a right to an administrative hearing. Indeed, where these considerations are involved a hearing is likely to *reduce* the chance of federal involvement, either by convincing the State that a contemplated non-renewal should not be pursued, or by convincing the teacher that the State's action is not constitutionally infirm and cannot be overturned in court.

These substantive limitations, of course, touch only a fraction of the myriad reasons why States deny renewal. The remainder involve considerations wholly free of substantive constitutional restraint. And recognizing a right to hearing will not alter in any respect the substantive freedom enjoyed by the States in these areas. It is simply not correct that courts will rule on the "appropriateness" of non-renewals. Nor will they require "cause" for non-renewal comparable to that required by State law for non-renewal of a tenured teacher. All of the reasons asserted by petitioners and the supporting *amici* for non-renewal—incompetency, mediocrity, the availability of better qualified personnel, reduction in teaching force, shifts in curriculum, etc.—will remain valid grounds for non-renewal, irrespective of whether a right to hearing exists. The hearing will enable the teacher to attempt to persuade the State that the ground ought not be pursued, but it will not preclude the State from pursuing

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[11] *Rolfe* v. *County Board of Education*, 391 F.2d 77 (6th Cir. 1968); *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966).

[12] *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246-247 (1957); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952).

[13] *Schware*, *supra*, 353 U.S. at 239.

it if, following hearing, it is convinced of the correctness of that course.

For these same reasons, hearing rights will not destroy the tenure system. The essential attribute of tenure is that it arms the longer-service teacher with protection against job loss absent "cause." In most States, removal of a tenured teacher requires proof of substantial misconduct. Nothing of this sort would be entailed in furnishing hearings to non-tenured teachers.

The record of the present case provides ample evidence of the valuable function a hearing can perform even in those areas where the State's substantive freedom of action is unlimited. One of the grounds cited by Dean Darken for recommending against renewal was that one day Roth had failed to meet any of his classes and had not applied for an approved absence (App. 126-127). But Roth insists, and the Chairman of his Department corroborates him, that he was ill on that day and had given the customary notice to the Chairman that he was unable to teach (App. 138-139, 143). It may well be that Dean Darken was unaware of these facts and that, had he been aware of the true circumstances, he would no longer have regarded the absence as culpatory. A statement of reasons, and a hearing, might thus have deterred a non-renewal based upon an erroneous or incomplete version of the facts.

Another of the grounds cited by Dean Darken was that Roth had devoted substantial class time during a two-week period to discussing subjects not germane to his course. According to the Dean, his information was based upon "detailed oral reports by four students." (App. 125). But Roth, and other students, deny that this occurred (App. 139, 145). Had a hearing been afforded, it might have been determined that Roth's version was correct, and that the students whose reports were relied upon by Dean Darken either failed to realize the relevancy of the subjects discussed in class, or acted out of hostility to Roth engendered

by his controversial role in campus politics. Thus, affording Roth an opportunity to be heard might have prevented an unjustified non-renewal of a competent teacher.

Yet another ground relied upon by Dean Darken was that Roth failed to give his students a final examination (App. 125). But the Chairman of Roth's Department states that Roth gave his students a "take home" final examination with his approval (App. 143), as other teachers have done in the past (App. 144). Here again, had Roth been afforded a hearing he might have aborted an unwarranted non-renewal.

In each of these instances, federal law imposes no substantive limitation on the State's freedom of action. Obviously, a State may deny renewal to a teacher who does not attend his classes, or who fails to teach materials relevant to his assigned courses, or who fails to administer final examinations in accordance with University regulations. If, following a hearing, a decision were reached not to renew on any of these grounds, it would not be subject to review for substantive deficiencies.[14] Nevertheless the hearing would have fulfilled its role; it would have enabled the teacher to present his side of the story prior to the decision.

One of the *amicus* briefs asserts that to require hearings in an area where the ultimate decision is discretionary and not governed by "ascertainable standards" would be "quite unprecedented in Anglo-American jurisprudence."[15] This is simply incorrect. As early as 1926 this Court declared, in

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[14] We are assuming, of course, that these were indeed the true grounds for the non-renewal, and not merely pretexts for, or accompaniments to, a decision based upon constitutionally impermissible grounds. We are further assuming that, in the circumstances, these grounds would not constitute "arbitrariness" violative of the Fourteenth Amendment. Whether these assumptions are correct is a matter still pending in the district court, in that part of the case not before this Court.

[15] Brief of The American Council on Education, et al., page 13.

Goldsmith v. *United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926):

> "The rules adopted by the board provide that 'the board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."

(b) The Alleged Incapacity of Colleges and Universities to Conduct Hearings

Petitioners assert (Brief, pp. 16-17) that colleges and universities were not "intended to be courts or quasi-judicial agencies" and cannot provide administrative bodies competent "to decide difficult constitutional issues." But they already perform this function in the case of tenured teachers when dismissal for cause is contemplated (*Id.* p. 4), and the hearings required in the case of non-tenured teachers would be less "quasi-judicial" because there is no statutory "cause" adjudication to be made. As we have shown, most of the grounds for non-renewal do not rise to substantive constitutional dimensions, and involve questions of university policy and practice which lay bodies may be more competent to deal with than lawyers or judges. When constitutional questions *are* involved—e.g., where non-renewal is contemplated for activities which are arguably protected by the First Amendment—the State has a responsibility to assure that its conduct comports with the Constitution, a responsibility which is enhanced by the full elicitation of the facts that a hearing would provide. Surely petitioners do not suggest that they terminate the employment of teachers without regard to the dictates of the Constitution. The State must obtain the necessary expertise to make these judgments, and invariably, as here, has attorneys whose primary function is

to advise State agencies with respect to their legal rights and responsibilities.[16]

(c) The Alleged Administrative Burden

Petitioners assert that the administrative burden of having to "conduct hearings on every case of non-renewal, or even if limited to those cases where requested, is staggering" (Brief, p. 18). This assertion is hard to accept. There were, after all, only 4 teachers denied renewal in 1970 at Oshkosh.[17] Moreover, a Wisconsin statute affords a hearing to non-tenured teachers at the elementary and secondary school levels, Wisc. Stats. § 118.22 (1969), and if that burden is sustainable surely the burden of providing hearings to the much smaller number of non-tenured teachers in higher education is not beyond the State's capacity. Indeed, it is ironic that in Texas (where *Sindermann* arises); Wisconsin (where this case arises) and California (one of the *amici*, also claiming burden, Brief of the Board of Trustees of the California State Colleges, p. 10), state law accords elementary and high school teachers the hearing rights resisted for college teachers in this case.[18] The widespread statutory provision of hearings in a large number of states for non-tenured teachers whose non-renewal is contemplated

[16] Of course, nothing precludes the State from designating a hearing tribunal which possesses expertise. An NEA survey discloses that one-fourth of the nation's school systems utilize third-parties to *hear* contract non-renewal cases, and 15.6% utilize third-parties to *determine* the non-renewal issue. NEA Research Division, *School Board Procedures Upon Non-Renewal of Teachers' Contracts, supra.*

[17] Petitioners state (Brief, p. 18, n. 11) that there were a total of 206 teachers notified of non-renewal throughout the Wisconsin University System in 1970. This information is not in the record, and thus we do not know how many of this total were non-renewals for economic reasons—non-renewals which would almost surely not result in requests for hearings.

[18] Texas Code Ann. § 21-204 (1969); Calif. Educ. Code § 13443 (West 1969).

(see NEA *amicus* brief in *Sindermann*, pp. 19-22) demonstrates that the administrative burden is not substantial.

Moreover, the burden is likely to be very much less than raw statistics might suggest. For the teacher whose performance is truly mediocre or incompetent is unlikely to demand a hearing at which his deficiencies will only be dramatized and publicized. And the teacher whose non-renewal stems from a reduction in force is even less likely to complain. Thus, it is reasonable to expect that only a fraction of the teachers notified of contemplated non-renewal, and given a statement of the reasons therefor, would invoke their right to a hearing.

The lack of administrative burden is confirmed by a recent study in the State of Washington, where a statute accords teachers facing non-renewal the right to a hearing (either before the school board or in court, at the teacher's option). In the school year 1969-70, there was a "teacher turnover" from all causes (deaths, retirements, resignations, reductions in force, non-renewals, etc.) of 4,225. But only 58 teachers received notices of non-renewal for reasons other than economy. Of these, only 26 sought hearings, 24 before the school board and 2 in court. Of the 24 board hearings, 6 resulted in retention of the teacher. In the school-year 1970-71, total teacher turnover was 4,224, but only 47 teachers received notices of non-renewal for reasons other than economy. Of these, 21 sought hearings, 19 before the school board and 2 in court, and 6 board hearings resulted in retention of the teacher.[19]

(d) The Alleged Deterrent to Non-Retention

Petitioners, and each of the *amici*, predict that if a statement of reasons and hearing are required colleges will not

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[19] Joint Committee on Education, Washington State Legislature, *Washington State's Continuing Contract and Discharge Laws for Certificated Common School Employees: A Preliminary Report to the Washington State Legislature by the Joint Committee on Education*, pp. 8-9, 35-36 (December 17, 1971).

initiate non-renewal proceedings against teachers who ought not be retained. This will occur, they predict, for two quite different reasons: (a) Because the reasons for non-renewal are often "subtle," they are incapable of articulation, and faced with the duty to articulate the State will sooner retain the teacher; and (b) In borderline cases, retention will be chosen as easier than trying to "prove" the teacher's inadequacies. Each of these reasons is fallacious.

The first is contrary to the way the academic process operates. As petitioners have themselves emphasized (App. 121-123, Brief, pp. 7, 18), the ultimate decision on non-renewal is made by the University President, on the basis of written recommendations received from his subordinates. If the grounds for recommending non-renewal can be articulated with sufficient particularity to enable the President to act thereon, as they were here (App. 125-131), there obviously can be no inability to articulate them to the teacher. Articulation was likewise no problem in *Sindermann* (*Sindermann* Appendix, pp. 12-23), where an elaborate press release was issued. And the California *amicus* has explained that written recommendations are the unvarying practice in that State (Brief, p. 6). Though the reasons for non-renewal may in some cases be "subtle," we find it difficult to believe that the academic community is incapable of articulating subtle concepts.[20]

The second fear—that retention will be chosen in borderline cases to avoid the burden of "proving" inadequacies—proceeds from the erroneous premise that at a hearing the State would have to "prove" the validity of its grounds for favoring non-renewal. As we have already shown (*supra*, pp. 17-18), there will be no such burden.

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[20] In some situations, of course, different persons may be advocating non-renewal for different reasons, but that is no obstacle to articulation. The teacher can be told precisely what the situation is, i.e. that some advocate his non-renewal for reason "A", and others for reason "B". The teacher can then address himself to all the grounds at the hearing.

(e) The Asserted Need to Avoid Inter-Personal Conflict

Petitioners and the *amici* suggest that the confrontation occasioned by a hearing would cause unpleasant inter-personal conflicts. They suggest that administrators and colleagues will hesitate to recommend non-renewal if they know that they will have to explain their reasons to the teacher, and that the problem will be compounded if the teacher indeed succeeds in securing renewal after learning who has sought his ouster.

These psychological considerations, of course, accompany any fair dismissal procedure. Colleges and universities having a tenure system already face them when removal of a tenured teacher is sought. Elementary and high schools in states where hearings are required prior to non-renewal already face them. The federal government, with its statutory Civil Service procedures, faces them. And every private employer who contractually affords a hearing upon termination—the overwhelming majority of American industry[21]—faces them.

This is not to say that the concerns are not real. There are undoubtedly persons who would advocate the ouster of a teacher—whether for good reasons or bad—if the teacher's removal could be accomplished without having to face him, but who would be unwilling to endure the discomfiture of explaining their reasons in the teacher's presence. And it is certainly true that when a teacher fights successfully for renewal the prior efforts to oust him will leave scars. But these are prices which generally have been recognized as worth paying in order to afford justice to the employee; the employee's interest in having an opportunity to defend his job has been deemed more important than the avoidance of inter-personal discomfiture which could be achieved by

[21] Eighty percent of collective bargaining agreements provide for hearings in connection with termination of employment. BNA, *Collective Bargaining Negotiations and Contracts*, page 40:4 (1969).

summary dismissal. Just as the scales have tipped in favor of the employee's interest throughout private industry in America, so ought they to tip under the balancing test of *Cafeteria Workers*.

(f) The Asserted Risk of Over-Caution in the Hiring Process

Finally, petitioners and the *amici* assert that if hearings are a necessary prelude to non-retention, schools will "follow a counsel of over-caution in their hiring practices," and innovative and non-conformist teachers will not be hired; they warn that "the schools would be left with a teaching force of homogenized mediocrities."

This fear, too, seems to emanate from the erroneous conception that a State must "prove" something in order to justify non-renewal. As we have shown, affording teachers the right to be heard does not increase the State's substantive burdens in denying renewal to unsatisfactory employees; errors in the hiring process can be remedied as surely with a hearing as without.

Moreover, it is absurd to think that America's colleges and universities—which are avowedly striving for controversy and innovation, and deplore mediocrity[22]—would alter their fundamental goals and staff themselves with mediocrities simply because required to afford non-renewal hearings. On the contrary, the provision of such hearings will strengthen faculties:

> "It is a social fact that the best academic men are attached to the ideology of a community of scholars and believe strongly in academic freedom. Places that fit these beliefs are more attractive than those that do not—recruitment and retention are shaped accordingly." Clark, Faculty Authority, 47 A.A.U.P. Bulletin 293 (1961) quoted in Emerson, Haber & Dorsen, *Po-*

[22] Brief of The American Council on Education, et. al., pp. 5, 8.

litical and Civil Rights in the United States, Vol. 1, p. 931 (1967).

(2) *The Public Interest in Providing Hearings*

Petitioners, and the *amici* supporting petitioners, assume that the only State interests are those which they advance *against* the provision of statements of reasons and hearings. In fact, there are several public interests which are *served* by the provision of procedural due process, and which weigh heavily in favor of affording such procedures. We discuss these herein.

(a) The Public Interest in Academic Freedom

As we have previously discussed, the hearing process will remove teachers' fears of speaking on public issues, a gain of inestimable value to the public.

(b) The Public Interest in the Retention of Superior Teachers

In both *Sindermann* and *Roth,* the non-renewed teacher was an exceptionally good teacher, and the reasons prompting non-renewal had nothing to do with teaching capability. Roth's teaching ability was rated "excellent," and his professional and scholarly growth "superior"; it was found that he "manages discussion well and his students seem highly motivated and involved" (Roth App. 132-133). Sindermann had ten years' experience teaching in Texas colleges, his colleagues evaluated him "a totally competent person professionally," and his excellence was attested by the fact that the President of the College named him Co-Chairman of his Department for a time (Sindermann App. 12, 52). That teachers of distinction are denied renewal is not uncommon. Caplow & McGee, *The Academic Marketplace,* pp. 50-51 (Anchor Books edition, Doubleday & Co., New York, 1965):

> "Our data abound in complaints from professors that they were not told exactly either why a given colleague

> was hired or fired or what he had or did not have that someone else had or did not have. Every university has its legends about certain firings . . . A haunting minor theme in the interview reports is a story like this [not an actual quotation]: 'He was one of the best young men we had, brilliant, productive, an excellent teacher, highly recommended, and unanimously supported by the department. When he came up for tenure, he was fired. We never knew why.' "

Public educational institutions are not private clubs; they are administered for the public good. The public has an interest in academic excellence and in the retention of superior teachers in such institutions. When it is proposed that such a teacher be non-renewed for reasons unrelated to teaching ability, the public interest is safeguarded by procedures which assure that mistakes are not made, and that the teacher has a full opportunity to demonstrate that the proposed grounds for non-renewal are ill-advised. We have already shown that the bases for Dean Darken's recommendation that Roth not be renewed may well have been factually erroneous. If so, the citizens of Wisconsin have needlessly been deprived of a fine teacher. A procedure which reduces the prospect of such error is in the public interest.

(c) Reduction of the Judicial Burden

As is evident from even a cursory view of current federal court dockets, there are today legions of cases pending under 42 U.S.C. § 1983 brought by non-renewed teachers.[23] These teachers generally have gone to court because there was no other forum in which their claims could be heard. This case load is doubly unfortunate: it puts a strain on already crowded federal court dockets, and it invites the

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[23] See, e.g., the 27 pending cases cited in the Appendix to this brief and the 100 pending cases cited in the Appendix to the NEA's *amicus* brief in *Orr* v. *Trinter*, No. 71-249.

very judicial involvement in academic community affairs which petitioners and the supporting *amici* abhor.

An important contribution of an administrative hearing procedure is that it will divert such cases from the courthouse to the campus. In many if not most cases, a pretermination hearing will obviate ultimate resort to the courts. Where the contemplated non-renewal is truly unjustified or unwise, the hearing is likely to persuade the State not to pursue it. On the other hand, where non-renewal is truly justified, the hearing is likely to convince the teacher that that is so, and demonstrate the futility of his incurring the enormous costs necessary to institute legal proceedings. Cf. *Murray* v. *Blatchford,* 307 F.Supp. 1038, 1053 (D.R.I. 1969):

> "[T]here was no opportunity for vigorous and fully informed adversarial confrontation on the issues raised by Murray. Had such confrontation emerged within the Peace Corps as it has now in the courts, this entire litigation might have been avoided."

See also Comment, Constitutional Rights of Public Employees: Progress Toward Protection, 49 N. C. L. Rev. 302, 318 (1917).

(d) The Public Interest in Accountability

Yet another public interest served by the hearing process is the assurance that non-renewal decisions are made intelligently and fairly. Hearings promote accountability; they assure fairness and integrity. The public inevitably benefits when its public officials are compelled to act responsibly and justly. Cf. O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 Sup. Ct. Rev. 161, 184-190.

In sum, the teacher's personal interests threatened by non-renewal, coupled with the public benefits which inure from the hearing process, far outweigh the factors advanced

by petitioners and the supporting *amici* in their efforts to avoid such procedures. On the balance of *Cafeteria Workers,* teachers are entitled to a statement of reasons and an opportunity to be heard before they are denied renewal.

CONCLUSION

For the reasons set forth hereinabove, the decision of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX

Partial listing of recently decided and pending cases involving claims under 42 U.S.C. § 1983 by nontenured teachers that their contracts were not renewed because of their exercise of First Amendment rights. This list does not include any cases involving dismissals of teachers during a contract year.

I. CASES PENDING:

S.D. Alabama: *Dickerson* v. *Board of School Commissioners of Mobile County,* C.A. No. 3003-63-T

The complaint, filed by three nontenured white teachers who had been employed in all-black schools of the Mobile, Alabama school system, alleges that their contracts were not renewed because of their involvement in peaceful protests against alleged violations by the school system of the civil rights of black students.

W.D. Arkansas: *Appler* v. *Mountain Pine School District,* HS-71-C-16

Plaintiff, a nontenured teacher, alleges that his contract was not renewed because he assigned *The Caine Mutiny* to his class.

D. Connecticut: *Simard* v. *Board of Education of Groton,* C.A. 14379

Plaintiff, a nontenured teacher, alleges his contract was not renewed in retaliation for his having taken a leading role in negotiations between the teachers' association and the school board.

D. Connecticut: *Pavlak* v. *Duffy,* C.A. No. 13436

The complaint alleges that the plaintiff was one of six nontenured faculty members at Northwestern Connecticut Community College whose contracts were not renewed because of their support for the prior president of the col-

lege, who had been asked to resign by the board of trustees.

District of Columbia: *Cardinale* v. *Washington Technical Institute*, C.A. No. 1052-71

Plaintiff, a teacher at Youth Manpower Training Program, alleges that her contract was not renewed because she had disagreed with the policy of the Program Director, and complained to the funding agency, U.S. Department of Labor.

S.D. Georgia: *Smith* v. *Sessions, et al.*, C.A. No. 1684

Plaintiff, a principal, alleges that the nonrenewal of his contract, on the ground of his public disagreements with school board policies, violated his First Amendment rights.

N.D. Illinois: *Miller* v. *School District 167, Cook County*, C.A. 71-C-1109

The complaint alleges that plaintiff's contract was not renewed because he was critical of the Board of Education.

N.D. Illinois: *Kalish and Enbysk* v. *Board of Education*, C.A. No. 69-C-1056

The complaint, filed by two nontenured teachers employed at an Illinois junior college, alleges that their contracts were not renewed because of their exercise of their constitutionally protected rights to speak out on matters concerning the policies of the college and their activities in organizing a professional association of teachers.

N.D. Iowa: *Mahood* v. *Ida Grove Community School District et al.*, C.A. No. 71-C-3025-W
Dodds v. *Ida Grove Community School District et al.*, C.A. No. 71-C-3026-W

Plaintiffs, nontenured teachers, allege that their contracts were not renewed because they

sent a letter to school board members inquiring about the renewal of their principal's contract.

N.D. Iowa: *Webb* v. *Lake Mills Community School District et al.*, C.A. No. 71-C-2053-C

A nontenured dramatics teacher alleges that his contract was not renewed because he produced plays which contained language the school board found objectionable.

E.D. Kentucky: *Aulck* v. *Jones et al.*, C.A. No. 1576

Plaintiff asserts that his contract was not renewed because of his associational activities and his criticism, — including "letters to the editor" — of school system officials.

S.D. Mississippi: *Thompson* v. *Madison County Board of Education, et al.*, C.A. No. 4692

A black nontenured social studies teacher alleges his contract was not renewed because of his assignment of essays on the shortcomings of the state of Mississippi and his complaints, as an elected alderman, of the misuse of Title I funds.

E.D. Missouri: *Reed* v. *Parkway School District*, Cause No. 70-C-584 (4), on appeal to the Eighth Circuit, No. 71-1640

Plaintiff, a nontenured teacher, alleges that her contract was not renewed after she distributed through the faculty mailbox information concerning activities of the Missouri State Teachers Association. She has appealed the dismissal of the complaint to the Eighth Circuit.

W.D. Missouri: *Wilson* v. *Pleasant Hills School District R-III, et al.*, appeal pending in Eighth Circuit, No. 71-1440

The complaint alleges that a nontenured teacher's contract was not renewed because of his activities as the leader of the local teachers association. A decision adverse to the teacher has been appealed to the Eighth Circuit.

W.D. Missouri: *Gieringer* v. *Center School District,* C.A. No. 18515-2

The complaint alleges that the contract of a nontenured teacher with 11 years' teaching experience was not renewed because he made misstatements of fact in a report to the local teachers association on the allocation of funds for teacher salaries.

D. Nevada: *Maule* v. *Zander,* C.A. No. R-2574

Plaintiff, a nontenured teacher, alleges that he was not rehired as a result of his speech critical of the school administration.

N.D. Texas: *Goade* v. *Taylor, et al.,* C.A. 4-1521

Plaintiff, a nontenured teacher, alleges that his contract was not renewed because he discussed with his students controversial issues such as drugs, war, and dress codes.

N.D. Texas: *Lusk* v. *Estes., et al.,* C.A. 3-4164-C

Plaintiff, a nontenured instructor in the Reserve Officers Training Corps, alleges that his contract was not renewed because he criticized the school board's approach to discipline.

S.D. Texas: *Zimmerer* v. *Spencer, et al.,* C.A. 69-H-804

Plaintiff, an instructor and acting department chairman in a junior college, alleges that she was demoted and that later her contract was not renewed, after expressing her concern for the academic quality of her department and criticizing the employment policies of the college.

W.D. Texas: *Willmon* v *Gutierrez,* C.A. DR-70C-A-12

A nontenured teacher alleges that her contract was not renewed because she placed right-wing political tracts in the school lounge

E.D. Virginia: *Johnson* v. *Harnel, et al.*, C.A. No. 411-71-R

Plaintiff, teaching at a community college, alleges that she was not retained because of her extra-curricular involvement in organizing and teaching at a free university.

E.D. Virginia: *National Faculty Association of Community and Junior Colleges* v. *State Board for Community Colleges, et al.*, C.A. No. 2-7-69-R

Four nontenured instructors were not renewed, they contend, for their active role in organizing a faculty association on campus.

N.D. West Virginia: *Chitwood, et al* v. *Flaster, et al.*, C.A. No. 71-8-F

Plaintiffs, who were teachers at a state college, allege that their contracts were not renewed because of their public involvement in anti-war activities and their criticism of the college administration.

W.D. Wisconsin: *Determan* v. *Joint School District No. 1, Villages of Gratiot, et al.*, C.A. No. 70-C-296

Plaintiff, without tenure, asserts that his contract was not renewed in retaliation for his leadership activity in the local teachers association.

D. Wyoming: *Bertot* v. *School District No. 1, Albany County*, C.A. No. 5623

Plaintiff, a nontenured teacher, asserts that her contract was not renewed because she showed interested students a film on black militancy after school hours.

D. Wyoming: *Sweeney* v. *School District No. 1, Albany County*, C.A. No. 5624

Plaintiff, a nontenured teacher, alleges that her contract was not renewed because she objected to a student dress code on a radio panel discussion program.

II. CASES DECIDED:

E.D. Arkansas: *Downs* v. *Conway School District*, 328 F. Supp. 338

The court found that the contract of a nontenured teacher was not renewed because she had exercised rights of free speech and petition in criticizing various policies of the school administration, including its neglect of a smoking incinerator on the playground. The court ordered the teacher reinstated with back pay.

M.D. Florida: *Stevenson* v. *Allen*, C.A. No. 70-33-Civ. T. (settled)

The complaint, filed by a nontenured professor at the University of South Florida, alleged that his contract had not been renewed because of his outspoken criticism of U.S. participation in the Viet Nam War, his open opposition to the Federal government's plan to create and maintain a system of anti-ballistic missiles, and his personal association with a large segment of the student body in peaceful off-campus protestations and other peaceful activities.

N.D. Indiana: *Roberts* v. *Lake Central School Corp. et al.*, 317 F. Supp. 63, 1970

The court ordered reinstatement of a teacher whose contract had not been renewed because of his criticism of the school administration during collective negotiations.

N.D. Mississippi: *Armstead* v. *Starkville Municipal Separate School District*, C.A. No. EC 70-51-S (July 27, 1971)

The court found that a black teacher was not reemployed because she had circulated documents criticizing alleged racial discrimination by school authorities against black educators. The teacher was ordered reinstated by the court.

D. New Hampshire: *Chase v. Fall Mountain Regional School District*, C.A. No. 3112 (July 28, 1971)

The court found that the contract of a nontenured teacher, who was chief negotiator for the local teachers association, was not renewed because of statements—critical of the school administration—made during the course of collective negotiations.

E.D. Texas: *Montgomery* v. *White* (320 F. Supp. 303)

The court found that a nontenured teacher's contract was not renewed as a result of his activity in a voter registration drive.

E.D. Virginia: *Haubner v. Rushton*, C.A. No. 4835-A

Plaintiff, a nontenured professor at Northern Virginia Community College, alleged that he was not reappointed because of his activity in attempting to organize at the college an affiliate of the National Faculty Association. On December 4, 1969, after a day and a half of trial, the defendants agreed to a settlement under which plaintiff was awarded $20,000.

E.D. Virginia: *Lee* v. *Smith, et al.*, C.A. No. 71-8-F

The court found, in a consent decree, that the contract of the plaintiff, a nontenured teacher, was not renewed as a result of his involvement in a dispute regarding state teacher association election procedures. Damages were awarded to the teacher and the nonrenewal was ordered expunged from his record.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY ET AL. *v.* SINDERMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–36. Argued January 18, 1972—Decided June 29, 1972

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents then declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held:*

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 3–5.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an oppor-

See concur + dissent

tunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 6–10.

430 F. 2d 939, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion. BRENNAN, J., filed an opinion dissenting in part, in which DOUGLAS, J., joined. MARSHALL, J., filed an opinion dissenting in part. POWELL, J., took no part in the decision of the case.

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SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in a federal district court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of em-

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[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

[3] The petitioners, for whom summary judgment was granted, submitted no affadavits whatever. The respondent's affadavits were very short and essentially repeated the general allegations of his complaint.

ployment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."[4]

The Court of Appeals reversed the judgment of the District Court. *Sindermann* v. *Perry*, 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth*, *ante*.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, *supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torasco* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 17; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education*, *supra*, with *Shelton* v. *Tucker*, *supra*.

Thus the respondent's lack of a contractual or tenure "right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exer-

cise of First and Fourteenth Amendment rights. *Shelton v. Tucker, supra; Keyshian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendment's protection of freedom of speech. Plainly, these allegations present a *bona fide* constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior Col-

lege, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth*, *ante*, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth*, *ante*, at — n. 14.

under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

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[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total

Thus the respondent offered to prove that a teacher, with his long period of service, at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

We have made clear in *Roth, ante,* at ——, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.,* at ——. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized

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probationary period in the academic profession is extended beyond the normal maxmium of seven years).

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

in writing, may be "implied." 3 Corbin on Contracts, §§ 561–672A. Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17–28.

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "suf-

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[7] We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law . . . ." *Board of Regents* v. *Roth*, *ante*, at —. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

ficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." 430 F. 2d, at 943. Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this this case to the District Court is

Affirmed.

MR. JUSTICE POWELL took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 70–36 & 71–162

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. (70–36)	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Board of Regents of State Colleges et al., Petitioners, v. David F. Roth, etc. (71–162)	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's judgments and opinions in *Perry* and *Roth*, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. Thus whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply:

> "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

state law . . . . ." *Board of Regents* v. *Roth, ante,* at pp. 12–13.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

SUPREME COURT OF THE UNITED STATES

Nos. 70–36 & 71–162

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. (70–36)	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
The Board of Regents of State Colleges et al., Petitioners, v. David F. Roth, etc. (71–162)	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting in No. 71–162 and dissenting in part in No. 70–36.

Although I agree with Part I of the Court's opinion in No. 70–36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Post*, at —. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71–162, and, to the extent indicated by my Brother MARSHALL, I would modify the judgment of the Court of Appeals in No. 70–36.

SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1972]

MR. JUSTICE MARSHALL, dissenting in part.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth*, No. 71–162, *ante*, at —, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOARD OF REGENTS OF STATE COLLEGES ET AL. *v.* ROTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-162. Argued January 18, 1972—Decided June 29, 1972

Respondent, hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave a nontenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal," but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. *Held:* The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty," or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, are not tantamount to a deprivation of "liberty," and the terms of respondent's employment accorded him no "property" interest protected by procedural due process. The courts below therefore

erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 5–14.

446 F. 2d 806, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, see No. 70–36, *Perry* v. *Sindermann*. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, see No. 70–36, *Perry* v. *Sindermann*. MARSHALL, J., filed a dissenting opinion. POWELL, J., took no part in the decision of the case.

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SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, *v.* David F. Roth, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968.*". The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statutory or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of University officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[3] A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents

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[2] Wisconsin Statutes 1967, c. 37.31 (1), in force at the time, provided in pertinent part that:

"All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior, after 4 years of continuous service in the state university system as a teacher."

[3] Wisconsin Statutes 1967, c. 37.31, in force at the time, provided in pertinent part that:

"No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February first "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."[4]

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969–1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

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[4] The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I—February 1st is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

"RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenured faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.

"RULE IV—When a non-tenured faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

The respondent then brought this action in a federal district court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[5] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F. 2d 806. We granted certiorari. 404 U. S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[6] We hold that he did not.

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[5] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the nonretention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate." 310 F. Supp., at 982.

[6] The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. *E. g., Orr* v. *Trinter,* 444 F. 2d 128 (CA6); *Jones* v. *Hopper,* 410 F. 2d 1323 (CA10); *Freeman* v. *Gould Special School District,* 405 F. 2d 1153

I

The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount.[7] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at the Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977–979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations

(CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drown* v. *Portsmouth School District,* 435 F. 2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectency" of continued employment. *Ferguson* v. *Thomas,* 430 F. 2d 852, 856 (CA5).

[7] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut,* 401 U. S. 371, 379. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell* v. *Burson,* 402 U. S. 535, 542. For

by procedural due process.[8] But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey* v. *Brewer*, — U. S. —, —. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 646 (Frankfurter, J., dissenting). For that reason the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[9] The Court has

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the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing; see, *e. g.*, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Phillips* v. *Commissioner*, 283 U. S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594.

[8] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S. 371, 378. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Hannah* v. *Larche*, 363 U. S. 420. The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, *supra*.

[9] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis

also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.[10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[11]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupa-

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of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson*, 403 U. S. 365, 374. See, *e. g.*, *Morrissey* v. *Brewer*, — U. S. —, —; *Bell* v. *Burson*, 402 U. S. 535, 539; *Goldberg* v. *Kelly*, 397 U. S. 254, 262; *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Pickering* v. *Board of Education*, 391 U. S. 563, 568; *Sherbert* v. *Verner*, 374 U. S. 398, 404.

[10] See, *e. g.*, *Connell* v. *Higgenbotham*, 403 U. S. 207, 208; *Bell* v. *Burson*, 402 U. S. 535; *Goldberg* v. *Kelly*, 397 U. S. 254.

[11] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. See, *e. g.*, *Stanley* v. *Illinois*, — U. S. —.

tions of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Stanley* v. *Illinois*, — U. S. —.

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States* v. *Lovett*, 328 U. S. 303, 316–317; *Peters* v. *Hobby*, 349 U. S. 331, 352 (concurring opinion). See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present

[12] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U. S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] due process," *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U. S. 96, 103. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[13]

[13] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guaranties. 446 F. 2d, at 809. But even assuming *arguendo* that such a "substantial adverse effect" under these circumstances would constitute a state imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.[14]

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affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners, supra.*

[14] See n. 5, *infra.* The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." 446 F. 2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll* v. *Princess Anne,* 393 U. S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines and so forth. *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrant,* 367 U. S. 717. See *Freedman* v. *Maryland,* 380 U. S. 51; *Bantam Books* v. *Sullivan,* 372 U. S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way com-

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one University. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers* v. *McElroy*, *supra*, at 895–896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U. S. 254.[15] See *Fleming* v. *Nestor*, 363 U. S. 603, 611. Simi-

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parable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.

[15] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. . . . The rules further provided that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim

larly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education*, 350 U. S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff*, 344 U. S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without a hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higgenbotham*, 403 U. S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

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to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.*, at 123.

law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at the Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require

[16] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by the Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment, see *Perry* v. *Sindermann*, *post*, at —, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the decision of this case.

[17] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 AAUP Bulletin 21 (Spring 1970).

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, v. David F. Roth, etc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University—Oshkosh—where from 1968–1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 Black students without determining individual guilt. He also criticized the unversity's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the Black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in a Federal District Court under 42 U. S. C. § 1983 [1] claim-

[1] Section 1983 reads as follows;

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ing in part that the decisions of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F. Supp. 972, 983. The Court of Appeals affirmed. 446 F. 2d 806.

Professor Will Herberg of Drew University in writing of "academic freedom" recently said:

> ". . . it is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment.
>
> "But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional." Washington Evening Star, Jan. 23, 1972.

There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in *Sindermann*.

No more direct assault on academic freedom can be imagined than for the school authorities to be

allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools also, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurter stated the constitutional theory in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 261–262 (concurring opinion):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

We repeated that warning in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special con-

> cern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* While discharges of employees for "cause" are permissible (*Fibreboard Corp.* v. *Labor Board*, 379 U. S. 203, 217), discharges because of an employee's union activities is banned by § 8(a)(3), 29 U. S. C. § 158 (c)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See *J. P. Stevens & Co.* v. *Labor Board*, 380 F. 2d 292, 300.

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the *Sweezy* case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the *Keyishian* case, one of the petitioners (Keyishian himself) had only a "one-year-term contract" that was not renewed. 385 U. S., at 592. In *Shelton* v. *Tucker*, 364 U. S. 479, one of the petitioners was a teacher whose "contract for the ensuing school year was not renewed" (*id.*, at 483) and two others who refused to comply were advised that it made "impossible their re-employment as teachers for the following school year." *Id.*, at 484. The oath required in *Keyishian* and the affidavit listing memberships required in *Shelton* were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system, as we noted in *Pickering* v. *Board of Education*, 391 U. S. 563, 569. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, *e. g., Graham* v. *Richardson*, 403 U. S. 365, 374. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). In *Hannegan* v. *Esquire*, 327 U. S. 146, 156, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In *Wieman* v. *Updegraff*, 344 U. S. 183, we held that an applicant could not be denied the opportunity for public employment because he had exercised his First Amendment rights. And in *Speiser* v. *Randall*, 357 U. S. 513, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgement of Fourteenth Amendment rights.

As we held in *Speiser* v. *Randall, supra*, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires

that the State bear the burden of proving that the speech was not protected. "The protection of the individual against arbitrary action . . . [is] the very essence of due process," *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 559 (1956), but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."

Moreover, where "important interests" of the citizen are implicated (*Bell* v. *Burson*, 402 U. S. 535, 539) they are not to be denied or taken away without Due Process. *Id.*, at 539. *Bell* v. *Burson* involved a driver's license. But also included are disqualification for unemployment compensation (*Sherbert* v. *Verner*, 374 U. S. 398), discharge from public employment (*Slochower* v. *Board of Education*, *supra*), denial of tax exemption (*Speiser* v. *Randall*, *supra*), or withdrawal of welfare benefits. *Goldberg* v. *Kelly*, 397 U. S. 254. And see *Wisconsin* v. *Constantineau*, 400 U. S. 433. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria Workers v. *McElroy*, 367 U. S. 886, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a

blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights (a) because his employment was conditioned on a surrender of First Amendment rights and (b) because he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F. Supp. 972, 979–980:

> "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact."

It was that procedure that the Court of Appeals approved. 446 F. 2d 806, 809–810. The Court of Appeals

also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures had been completed.[2] As stated by the Court of Appeals in *Sindermann*:

> "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." 430 F. 2d, at 944–945.

That is a permissible course for District Courts to take, though it does not relieve them of the final determination whether nonrenewal of the teacher's contract was in retaliation of the exercise of First Amendment rights.

Accordingly I would affirm the judgment of the Court of Appeals.

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[2] Such a procedure would not be contrary to the well-settled rule that § 1983 actions do not require exhaustion of other remedies. See, *e. g.*, *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Damico* v. *California*, 389 U. S. 416 (1967); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Monroe* v. *Pape*, 365 U. S. 167 (1961). One of the allegations in the complaint was that respondent was denied any effective state remedy, and the District Court's staying its hand thus furthered than thwarted the purposes of § 1983.

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al., Petitioners, v. David F. Roth, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1972]

MR. JUSTICE MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968–1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1] This claim was sustained by the District Court which granted respondent summary judgment, 310 F. Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F. 2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a

[1] Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—*i. e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory [2] or contractual [3] controls, a government employer is different. The government may only act fairly and reasonably.

This Court has long maintained that, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) (Hughes, J.). See also *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax* v. *Reich*, 239 U. S., at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can

[2] See, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); 42 U. S. C. § 2000e.

[3] Cf. Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L. J. 1302 (1948).

establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, *e. g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett*, 328 U. S. 303, 316–317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

MR. JUSTICE DOUGLAS has written that

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S., at 179.

And Mr. Justice Frankfurter has said that "[t]he history of American freedom is, in so small measure, the history of procedure." *Malinski* v. *New York*, 324 U. S. 401, 414 (1945). With respect to occupations controlled by the government one lower court has said that "[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby* v. *Allen*, 326 F. 2d 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 262 (1970); *Bell* v. *Burson*, 402 U. S. 535 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons and a chance for a hearing on disputed issues of fact;[4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing;[5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing;[6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute.[7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed

[4] *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926).
[5] *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956).
[6] *Willner* v. *Committee on Character*, 373 U. S. 96 (1963).
[7] *Connell* v. *Higginbotham*, 403 U. S. 207 (1972).

and he was not informed of the reasons and given an opportunity to respond.

It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. *Goldberg* v. *Kelly, supra.* The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results not from malice, but from innocent error. "Experience teaches . . . that the affording of procedural safeguards, which by their nature

serve to illuminate the underlying facts, in itself operates to prevent erroneous decisions on the merits from occurring." *Silver* v. *New York Stock Exchange*, 377 U. S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

> "In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best assurance for the Government itself against those blunders which leave lasting strains on a system of justice'—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal than one's own. . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of L. 70–73 (1961).

Accordingly, I dissent.